

No. 13692

United States
Court of Appeals
for the Ninth Circuit.

DAVID DON SCHUMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

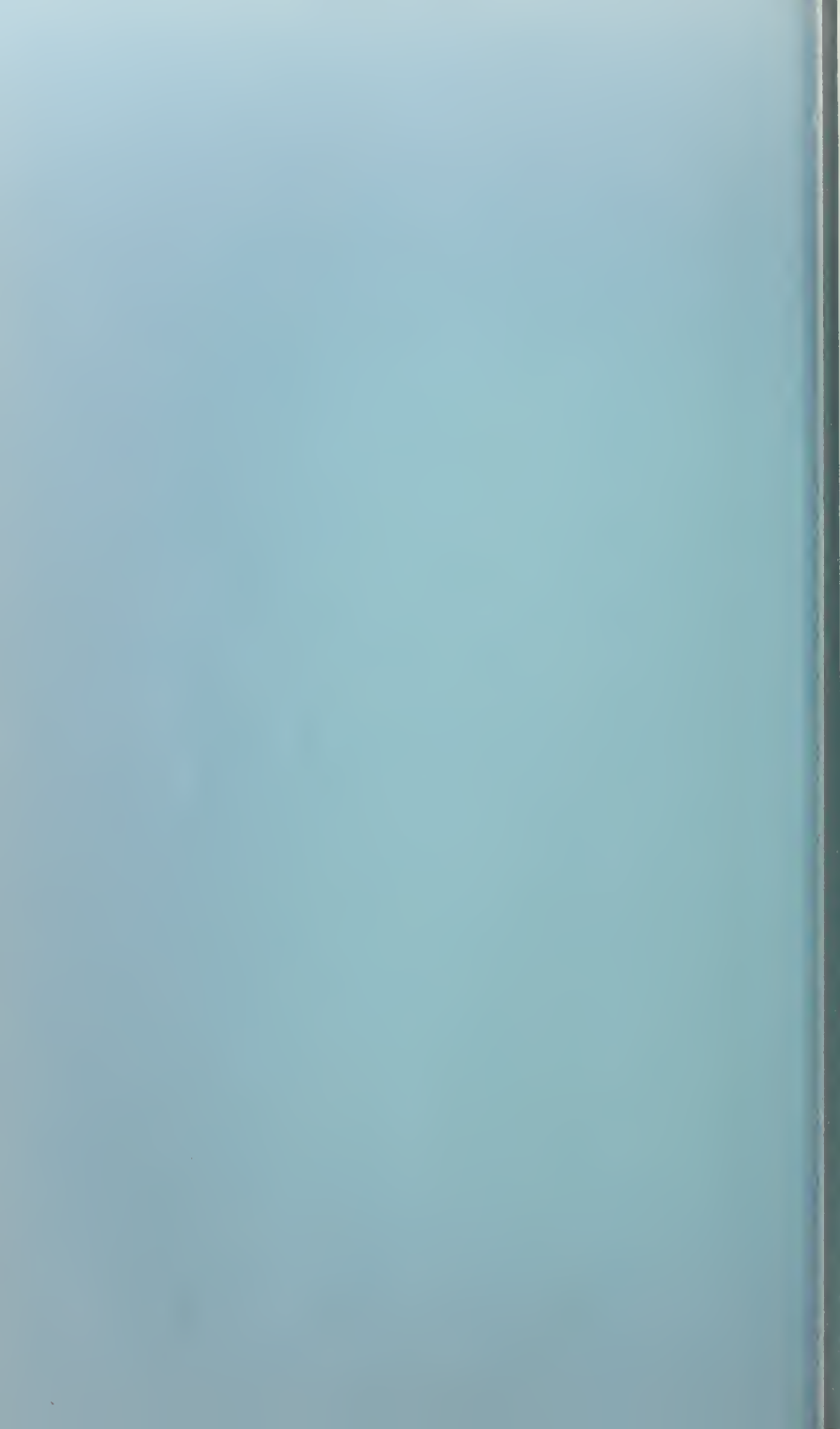
Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

MAY 21 1953

PAUL P. O'BRIEN



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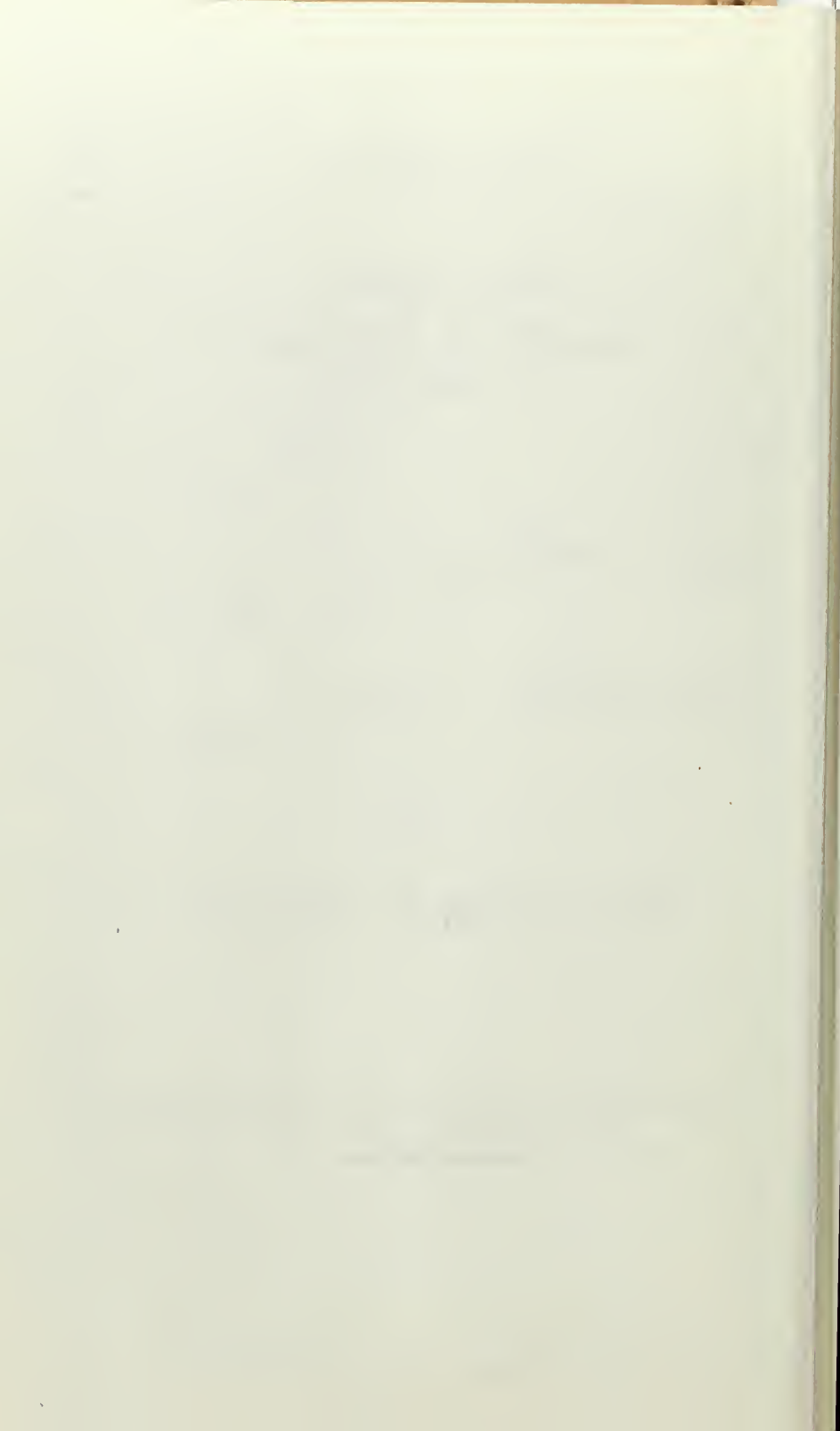
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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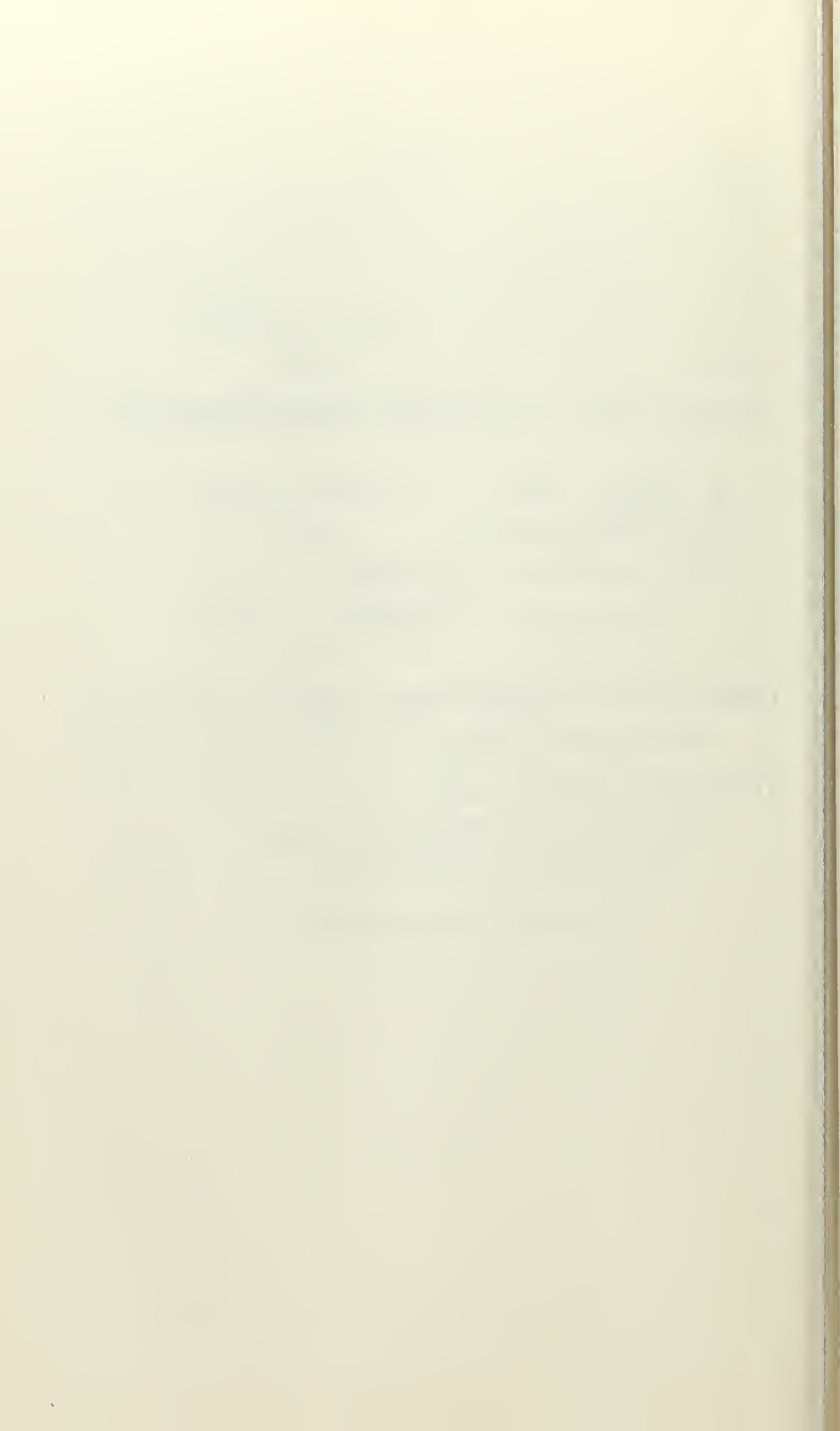
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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco 4, California,
Attorney for Appellant.

CHAUNCEY TRAMUTOLO, ESQ.,
United States Attorney;

JOSEPH KARESH, ESQ.,
Assistant United States Attorney,
San Francisco, California,
Attorneys for Appellee.



In the United States District Court for the Northern
District of California, Southern Division

No. 33332

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID DON SCHUMAN,
Defendant.

INDICTMENT

(Violation: Section 12(a), Universal Military
Training and Service Act, 50 U.S.C. App.
462(a).) Refusal to Submit to and Be Inducted
Into the Armed Forces.

The Grand Jury Charges: That

David Don Schuman, defendant herein, being a
male citizen, of the age of 22 years, residing in the
United States and under the duty to present him-
self for and submit to registration under the pro-
visions of Public Law 759 of the 80th Congress,
approved June 24, 1948, known as the "Selective
Service Act of 1948," as amended by Public Law
51 of the 82nd Congress, approved June 19, 1951,
known as the "Universal Military Training and
Service Act," hereinafter called "said Act," and
thereafter to comply with the rules and regulations
of said Act, and having, in pursuance of said Act
and the rules and regulations made pursuant
thereto, become a registrant of Local Board No. 38
of the Selective Service System in the City and

County of San Francisco, State of California, which said Local Board No. 38 was duly created, appointed and acting for the area of which the said defendant is a registrant, did, on or about the 28th day of August, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-A, and having theretofore been duly ordered by his said Local Board No. 38 to report at San Francisco, California, on the 28th day of August, 1952, for induction into the Armed Forces of the United States, and having so reported, did then and there knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act, and the rules and regulations made pursuant thereto.

A True Bill.

/s/ JAMES C. DORWELL,
Foreman.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

Approved as to Form:

/s/ J. K.

Penalty: Imprisonment not to exceed 5 years, or
Fine not to exceed \$10,000.00, or both.

Bail, \$2,000.

/s/ MICHAEL J. ROCHE.

[Endorsed]: Filed September 4, 1952.

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 10, 1952

Present: The Honorable Michael J. Roche,
District Judge.

This case came on regularly for arraignment. Joseph Karesh, Esq., Assistant United States Attorney, was present on behalf of the United States. Gerald Kilday, Esq., was present on behalf of the defendant. The defendant was handed a copy of the indictment, waived reading thereof, stated his true name to be as charged, and was thereupon duly arraigned upon the indictment.

A motion on behalf of the defendant for reduction of bail from \$2,000.00 to \$1,000.00 was ordered granted, and defendant's application for permission to leave the jurisdiction of the Court was likewise granted.

The Court ordered that this case be continued to September 24, 1952, at 9:30 a.m. for the entry of plea.

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 24, 1952

Present: The Honorable Michael J. Roche,
District Judge.

The defendant, with his attorney, Gerald Kilday, Esq., was present in Court. Joseph Karesh, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant pleaded Not Guilty to the indictment and waived trial by jury, which written waiver was approved by the United States and the Court.

This case was ordered continued to October 17, 1952, at 9:30 a.m. for trial.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above-entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, Sept. 24, 1952.

/s/ DAVID DON SCHUMAN,
Defendant.

/s/ J. H. BRILL,
Attorney for Defendant.

/s/ JOSEPH KARESH,
Assistant United States
Attorney.

Approved:

/s/ MICHAEL J. ROCHE,
Judge.

[Endorsed]: Filed September 24, 1952.

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 17, 1952

Present: The Honorable Monroe M. Friedman,
District Judge.

This case came on regularly this day for trial by Court, sitting without a jury.

Joseph Karesh, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant was present with his attorney, John Brill, Esq.

Mr. Karesh and Mr. Brill made their respective opening statements to the Court.

William G. Harry was sworn and testified on behalf of the United States.

Mr. Karesh introduced in evidence certain exhibits which were filed and marked U. S. Exhibits Nos. 1 to 32, inclusive. The Government thereupon rested.

Mr. Brill made a motion for a judgment of acquittal, at the close of plaintiff's case, which motion was argued upon the close of the defendant's case and ordered submitted.

Mr. Brill made a motion for production of certain documents, and due consideration having been had thereon, it is Ordered that said motion be denied.

Mr. Karesh made a motion to quash a subpoena, heretofore filed in open Court, as to Chauncey Tramutolo, which motion was ordered granted.

Mr. Brill moved to withdraw a certain other subpoena, having been improperly filed, which motion

was ordered granted. By stipulation of counsel, Mr. Tramutolo was excused.

Joseph Bonzani and Mathew Dooley were sworn and testified on behalf of defendant.

The hour of adjournment having arrived, the Court ordered this case under submission and continued it until October 21, 1952, for decision. Ordered that the defendant be permitted to remain at large on bail.

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 24, 1952

Present: The Honorable Monroe M. Friedman,
District Judge.

The parties hereto being present as heretofore, and the defendant being present in proper person, this case came on regularly this day for further hearing on the Court's own motion.

Joseph Bonzani being called on the Court's own motion, having been sworn, testified for the information of the Court.

Both parties having been heard, and after due consideration, the Court adjudged the defendant Guilty as charged, and ordered that this case be referred to the Probation Officer for pre-sentence investigation and report. Ordered case continued to November 7, 1952, at 9:30 a.m. for hearing on report of Probation Officer and for sentence.

[Title of District Court and Cause.]

MINUTES OF THE COURT—NOV. 7, 1952

Present: The Honorable Monroe M. Friedman,
District Judge.

The parties hereto, and the defendant being present in proper person, this case came on regularly this day for sentence.

After hearing the respective counsel, and the defendant personally as to whether or not said defendant would consider entering the Armed Forces in a non-combatant capacity, and having been advised that defendant would not so enter in such capacity, It Is Ordered that said defendant David Don Schuman be, and he is hereby, sentenced to be imprisoned for a period of Eighteen (18) Months in an institution to be designated by the U. S. Attorney General. Ordered that judgment be entered herein accordingly.

Attorney for defendant gave Notice of Appeal and made a motion that defendant be permitted to remain at large on bail pending appeal. Ordered case continued to November 13, 1952, at 9:30 a.m. for further hearing. Ordered that defendant remain on his present bail.

United States District Court for the Northern
District of California, Southern Division

No. 33332

UNITED STATES OF AMERICA,

vs.

DAVID DON SCHUMAN.

JUDGMENT AND COMMITMENT

On this 7th day of November, 1952, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a)—(Defendant, David Don Schuman did, on August 28, 1952, at San Francisco, Calif., knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States), as charged in the Indictment (single count); and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of Eighteen (18) Months.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MONROE M. FRIEDMAN,
United States District Judge.

Examined by:

/s/ JOSEPH KARESH,
Assistant U. S. Attorney.

The Court recommends commitment to: an institution to be designated by the U. S. Attorney General.

C. W. CALBREATH,
Clerk.

By /s/ A. B. DIEPENBURGH,
Deputy Clerk.

M. E.

[Endorsed]: Filed and entered November 7, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: David Don Schuman, 44 Aztec, San Francisco, California.

Name and address of appellant's attorney: J. H. Brill, 1020 Mills Building, 220 Montgomery Street, San Francisco 4, California.

Offense: Violation of Selective Service Training Act.

Concise statement of judgment and sentence rendered November 7, 1952, is that the defendant be committed to the custody of the Attorney General for a period of eighteen (18) months. Stay of execution granted to Thursday, November 13, 1952.

I, the above-named appellant, by my attorney, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: November 12, 1952.

/s/ J. H. BRILL,

Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 12, 1952.

[Title of District Court and Cause.]

ORDER FOR RELEASE ON BAIL
PENDING APPEAL

Whereas, on the 7th day of November, 1952, at a term of the United States District Court in and for the Northern District of California, Southern Division, in a proceeding in said Court entitled as above, and wherein David Don Schuman was convicted as charged in the indictment of violating Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a), and

Whereas, on said 7th day of November, 1952, judgment and sentence was made, given, rendered and entered against said David Don Schuman by

said Court, who was by said judgment sentenced as follows: Committed to the custody of the Attorney General, to be imprisoned for a term of eighteen (18) months in such federal institution as shall be designated by said Attorney General, and

Whereas, thereafter, on said 7th day of November, 1952, the Court was advised by the defendant that an appeal would be prosecuted in good faith and would not be taken frivolously or for the purpose of delay, and

Whereas, on said 7th day of November, 1952, a motion for defendant's release on bail pending determination of said appeal was made by said defendant, on the ground that the case involved substantial questions of law which should be determined by the Appellate Court, and

Whereas, said motion for bail was continued to November 13, 1952, for further hearing, and

Whereas, it appearing to this Court that a notice of appeal was filed by defendant, and it further appearing to this Court that this case involves the following substantial questions of law:

(a) Whether or not there was a basis in fact for the classification given defendant, and

(b) Whether or not the constitutional rights of the defendant have been violated in the refusal of the Court and the Attorney General to permit the F. B. I. reports used by the Hearing Officer of the Department of Justice to be introduced in evidence, or used by the defendant to ascertain the names of the informants and to permit defendant to cross-examine such informants;

and it further appearing to this Court that said appeal is and will be prosecuted in good faith;

Now, Therefore, it is hereby ordered that defendant be released on bail in the sum of One Thousand and no/100 Dollars (\$1,000.00), cash, in the form and upon the conditions as required by law, pending the appeal in the above-entitled cause, to be approved by the District Court in and for the Northern District of California, Southern Division, and filed with the clerk of that Court.

Dated: November 14, 1952.

/s/ MONROE M. FRIEDMAN,
United States District Judge.

Nov. 14, 1952, approved as to form.

/s/ JOSEPH KARESH,
Asst. United States Attorney.

[Endorsed]: Filed November 17, 1952.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Upon hearing of the motion made ex parte and good cause therefor appearing, It Is Hereby Ordered that the time within which to file and docket the record on appeal in the above-entitled

case is hereby extended to and including the 22nd day of January, 1953.

Dated: December 16th, 1952.

/s/ MONROE M. FRIEDMAN,
Judge of the District Court.

Approved as to form:

CHAUNCEY TRAMUTOLO,
United States Attorney.

By /s/ JOSEPH KARESH,
Assistant United States
Attorney.

[Endorsed]: Filed December 16, 1952.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 33332

Before: Hon. Monroe M. Friedman, Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID DON SCHUMAN,
Defendant.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:
JOSEPH KARESH, ESQ.

For the Defendant:
JOHN H. BRILL, ESQ.

Friday, October 17, 1952

The Clerk: United States vs. David Don Schuman, for trial.

Mr. Brill: Ready.

Mr. Karesh: Ready.

The Clerk: Would respective counsel please state their names for the record?

Mr. Karesh: Joseph Karesh, Assistant United States Attorney, appearing for the Plaintiff, the United States.

Mr. Brill: John H. Brill, appearing for the Defendant.

The Court: Do you want to make an opening statement, Mr. Karesh?

Mr. Karesh: The indictment charges the defendant with a violation of the Universal Military Training Service Act.

The Government will show that David Don Schuman is a male citizen of the United States of the age of 22; that he registered for selective service, and he was assigned through error to Local Board Number 40, his true Board being Board 38; was thereafter properly assigned to Board 38. He was ultimately classified after appeal in Class 1-A, was ordered to report for induction into the Armed Forces, did report at San Francisco on the 28th day of August, 1952, and then and there did knowingly refuse to submit himself to being inducted into the armed forces of the United States.

The Court: Do you want to make an opening statement?

Mr. Brill: I don't believe so at this time, your Honor. [2*]

There is no question but that the classification indicated by the United States Attorney is the one that was ultimately given him. There is no question but that he refused to accept induction into the armed forces. He reported for induction, however, but refused to make the step forward and accept induction, and this indictment resulted.

Mr. Karesh: Will the clerk come forward, please.

May it please your Honor, counsel has stipulated that, without calling the clerk, we may offer the entire contents of the selective service file in evidence on behalf of the United States. I have furnished him with photostats of the file. There may be certain documents like physical examination reports that might stay out. We will begin to offer them. I have given you photostats.

Mr. Brill: That is correct. It will be stipulated for the record that all of the files and records produced by the draft board may be offered in evidence without objection in this manner.

The Court: Well, you are about to offer certain documents in evidence?

Mr. Karesh: Yes.

The Court: Are you going to offer them one at a time?

Mr. Karesh: Yes, because they would have to be read, I presume.

The Court: If you have any objections, raise

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

them as you [3] go along. If I do not hear from you, I will understand that you raised no objections to the introduction of the particular document in evidence.

Mr. Brill: As I understand it, the entire file is to be offered in evidence, together with all of the exhibits and documents presented by the registrant himself, is that correct?

Mr. Karesh: Yes. Your Honor, in the interest of time, certain documents being lengthy, we will submit them to your Honor. Your Honor can read them, and their contents can be deemed read into the record. Counsel has a photostatic copy of the file.

The Court: Is that satisfactory?

Mr. Brill: Fine; so stipulated.

The Court: You offer them in evidence?

Mr. Karesh: Yes, offer the file in evidence. As I do, it can be numbered 1, 2, 3, as they go into evidence because there may be certain documents which we will not offer.

The Court: All right.

Mr. Karesh: As U. S. Exhibit 1, we offer the registration card of David Don Schuman, SSS Form No. 1, in evidence.

The card indicates he registered September 17, 1940, in San Francisco; that he was assigned to Board 40; ultimately the board was changed and the card reflects the correct board, Board 38. His address was 3009 Mission Street, San Francisco. His occupation was student. He gives his mother's name as [4] Mrs. Memi E. Schuman; his date of

birth August 15, 1930; place of birth Seattle, Washington. He had never served in the armed forces and he had no membership in a reserve component or no active duty in the armed forces of the United States at any time.

The Clerk: United States Exhibit Number 1 in evidence.

(Thereupon the registration card marked United States Exhibit Number 1 in evidence.)

Mr. Karesh: As U. S. Exhibit next in order we would offer the Selective Service Questionnaire of David Don Schuman, SSS Form 100, filed with the Local Board, September 1, 1949, having been mailed to him August 25, 1949.

There is the identification of the registrant, his name and address. He has no social security number. That is Series 1.

Series 2 "Present members of armed forces" is left blank.

Series 3 "Prior military service" is blank.

Series 4 "Officials deferred by law" is left blank with the exception of the word "None" written in.

Series 5 "Sole surviving son."

"I am not the sole surviving son of a family of which one or more sons or daughters were killed in action or died while serving in the armed forces of the United States or subsequently died as a result of injuries received or disease incurred from such service." [5]

Series 6, "I am not a minister of religion. I do not regularly serve as a minister." And the rest

of it is left blank; particularly with relation to the point about students preparing for the ministry, that is left blank.

“Family Status.” “I have never been married.”

“Occupation.” “If this box is checked, complete Series XI” and he checked the box but Series XI was not completed.

The “Agricultural Occupation” is not filled out.

His education: Six years of elementary school, three years of junior high school, and three years of high school, did not graduate from high school. He has had other schooling at San Francisco State College, biology; length of time attended six weeks.

“Student. I am a full time student at City College of San Francisco located at San Francisco, majoring in Pre Med preparing for doctor.

“I expect to receive from this institution credits to go to California University in September, 1951.

“I intend to take examination for license in Doctor on 1958.”

Citizenship: “Born Seattle, Washington, in August 15, 1930. Race is white. I am a citizen or subject of the United States.”

His “court record: None.”

“Conscientious objection to war,” Series XIV has not been [6] filled out.

Series XV Physical Condition. He had no physical defects.

“Registrant’s statement regarding classification.” He did not request any particular classification.

There is the certificate and signature of the registrant. He states that all the foregoing statements are in his own handwriting.

Now there is in the file, may it please your Honor, a certain affidavit——

The Court: Is there any statement in there concerning a request for exemption?

Mr. Karesh: No request for any exemption.

The Court: Read me again the pertinent parts concerning exemption just exactly.

Mr. Karesh: “Registrant’s statement regarding classification.

“In view of the facts set forth in this questionnaire it is my opinion that my classification should be Class”—and it is left blank.

I might add, your Honor, that the instructions say that “it is optional with the registrant whether or not he completes this statement and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of registrant on the basis of the facts before it, which will be [7] taken fully into consideration regardless of whether or not this statement is completed.”

The Court: Read again the portion about the minister.

Mr. Karesh: The minister part just says “minister, or student preparing for the ministry.”

“The instructions. Every registrant who is a minister or a student preparing for the ministry shall complete the statements in this series that apply to him.” And he writes “I am not a minister of religion” and he writes him “I do not regularly serve as a minister.” The rest is left blank, that portion about whether he is a student or not.

The Court: It will be admitted.

The Clerk: United States Exhibit Number 2 in evidence.

(Thereupon the Selective Service Questionnaire marked United States Exhibit Number 2 in evidence.)

Mr. Karesh: There is in the file, your Honor, a certificate from one Edwin Soderlund certifying that the registrant is an ordained minister. Apparently it was received in 1950. We will withhold this document at this time until we can set the time for it.

As U. S. Exhibit number next in order I will offer a letter of August 14, 1950, from the registrant to the Board in which he asks to be classified as a minister. I would like to read this letter to your Honor. (Reading Exhibit.) [8]

What document is this, Mr. Clerk?

The Clerk: United States Exhibit number 3 in evidence.

(Thereupon the letter was marked United States Exhibit Number 3 in evidence.)

Mr. Brill: I think it only fair to the Court, since these are being read, that the date should be pointed out. The date of this letter is August 14, 1950.

Mr. Karesh: As U. S. Exhibit next in order I offer this document from one Edwin Soderlund, apparently, and I believe it is stipulated to, that it

was filed August 14, 1950. I would like to read it to your Honor. (Reading.)

The Clerk: United States Exhibit number 4 in evidence.

(Thereupon the document was marked United States Exhibit number 4 in evidence.)

Mr. Karesh: May I have the questionnaire back, the whole thing?

Reading from the entries on the back of the questionnaire, your Honor, U. S. Exhibit 2.

“10/19/50. Classified 1-A by a vote of three to nothing.

“November 3, 1950, Form 110 mailed,” which is— which is the notice of the classification mailed to the registrant.

“11/8/50. Request for personal interview mailed.”

I should like to offer as U. S. Exhibit next in order a letter of November 9, 1950, from the registrant.

Mr. Brill: Excuse me. At this time we are going to ask [9] the Court to take cognizance of the fact that all of the records made by Draft Board 38 were subsequently annulled by their own order, they having found they failed to have jurisdiction of Mr. Schuman. It is true that it is in the file, but all of the actions taken before Local Board 38 subsequently were annulled by their own action.

Mr. Karesh: You mean taken by 40, and were then started over by 38.

Mr. Brill: That is correct.

Mr. Karesh: I think I said that in my opening statement.

The Court: Then if that is the fact why did you stipulate the admission in evidence?

Mr. Brill: It is part of the file. We are not going to object to anything that is in the file itself. We have nothing to hide at all. I suppose that all of the other documents——

Mr. Karesh: All that went to the Board of Appeals?

Mr. Brill: Yes, that is correct, but I think that this particular record of action taken by the other Board itself should not be——

The Court: What is the date? When was it filed?

Mr. Karesh: 7/28/51. The records of registrant were transferred to Local Board 38. We haven't come to that yet, but all these documents constitute part of the file.

The Court: Except the action taken by the Board.

Mr. Karesh: The action of course is not binding, and they [10] started all over, as your Honor will see.

The Court: All right.

Mr. Brill: The only reason I mentioned that is I felt that the Court should know that all of the actions taken by the other board, that is, Board No. 40, were subsequently annulled.

Mr. Karesh: This is the letter of appeal, your

Honor, of November 9, 1950. We offer it as U. S. Exhibit next in order.

(Reading exhibit.)

The Clerk: United States Exhibit Number 5, in evidence.

(Thereupon the letter was marked United States Exhibit Number 5 in evidence.)

Mr. Karesh: We have the minutes or the summary of the personnel hearing of 11/30/50. (Reading exhibit.)

The Clerk: United States Exhibit Number 6 in evidence.

(Thereupon the summary of the personnel hearing marked United States Exhibit Number 6 in evidence.)

Mr. Karesh: And on the back of the questionnaire is the entry: "11/30/50. Class 1-A continued. Suggest registrant appeal.

"12/30/50. Form 110 mailed.

"1/19/51. Order for Physical 1/29/51."

We would offer this copy of the Order for Physical dated January 19, 1951, to report the 29th of January, 1951. It is merely a sheet of paper, your Honor, with certain information written in; the exact copy of the physical is not presented, [11] but counsel will stipulate that this order for a physical was sent to the registrant.

The Court: Do you stipulate that all of these documents may be introduced in evidence?

Mr. Brill: Pardon?

The Court: You have stipulated all of these documents may be introduced in evidence?

Mr. Brill: All of the documents themselves may be introduced in evidence, yes, sir. If counsel is reading as to the action taken by the board, I don't believe, in view of the circumstances, that should be brought to the attention of the Court. We therefore will not stipulate those portions being read to the Court, but the documents themselves we have no objection to.

Mr. Karesh: You mean I can't read a questionnaire?

The Court: The moment you introduce a paper in evidence, the entire paper or any portion thereof may properly be read to the Court.

Mr. Brill: Then I didn't realize that it had a record here of the actions taken by the local board. It was on the back of the Selective Service Questionnaire.

The Court: Mr. Brill, I want you to go through the whole record there, take all the time you need, and make up your mind whether or not you are stipulating to the introduction in evidence— [12]

Mr. Brill: We will stipulate to the introduction in evidence of all of the documents in the file with the exception of the record of the action taken by Board 40 during the time it acted improperly and during the time that it was incapable of acting because of lack of jurisdiction.

Mr. Karesh: Well, of course—

Mr. Brill: The documents themselves were sub-

sequently transmitted to the new board and acted as the record of the registrant before the new board, but all of the actions taken by the former board were annulled. There is a letter in the file which I think would operate to annul all of the previous actions.

Mr. Karesh: There is no question about that, but your Honor of course wanted to see if you had any objection——

The Court: All I am talking about is whether or not you are stipulating to the introduction in evidence of all of the documents. That is all I want to know.

Mr. Brill: We are stipulating—we make this stipulation: that all of the documents in the file may be offered in evidence with the exception of the record of the action taken by the improper board.

Mr. Karesh: I think, your Honor, there is no prejudice to the registrant to show what action Board 40 took.

The Court: It was annulled.

Mr. Karesh: To show it was annulled, you have to show [13] something was annulled.

The Court: That is not material.

Mr. Brill: Yes, it is not material.

Mr. Karesh: If he doesn't wish me to read any entries before Board 40, I have no objection; it is all right with me.

The Court: The papers that have been introduced in evidence up until now I understand were by stipulation.

Mr. Brill: That is correct.

The Court: All right. Let us take the next paper, one at a time, that is what we will do, so there won't be any error in this record.

Mr. Brill: Thank you.

The Court: So far all the papers that have been introduced in evidence have been introduced by stipulation.

The Clerk: That includes the last offer which Mr. Karesh just read into the record.

The Court: The last one was dated January 19, 1951.

Mr. Karesh: That is the typed order.

The Court: You may interpret it as you please.

Mr. Karesh: That is the order for a physical. It doesn't make any difference, your Honor, because that was annulled, too.

The Court: Just show it to Mr. Brill. It was stipulated that may be introduced in evidence. I don't want any half stipulations, gentlemen; I want a definite yes or no.

Mr. Brill: You were reading something. I assumed that [14] what you were reading to the Court was on this page?

Mr. Karesh: That is all I read.

Mr. Brill: We cannot stipulate that what you pointed out to the Court as being on this document is on it, because it is not.

Mr. Karesh: I said if it was not agreed to by counsel, then I could call the clerk and she could say it was the piece of paper put into the typewriter when the original order to report for physical was typed; that she did not have an extra copy so

that was typed on a blank piece of paper. It doesn't make any difference. This action was annulled. I will withdraw it then; it doesn't make any difference.

The Court: Make up your mind. Do you withdraw it?

Mr. Karesh: I will offer it. If he doesn't want it, he can object.

Mr. Brill: We will object to that because it is necessary to read from actions of the board.

The Court: Put it aside and put the clerk on for that purpose, and take the next one. Just put it aside. If you want to offer it in evidence, you put the clerk on.

Mr. Karesh: All right. As U. S. Exhibit next in order a letter of January 22, 1951, protesting the 1-A classification.

The Court: Any objections to the introduction?

Mr. Brill: No, your Honor.

The Court: Admitted. [15]

The Clerk: United States Exhibit Number 7.

(Thereupon the letter was marked United States Exhibit Number 7 in evidence.)

Mr. Karesh: In the interests of time, I should ask your Honor to read it.

The Court: Go ahead.

Mr. Karesh: May it please your Honor, as U. S. Exhibit next in order and as one exhibit I offer a letter with certain documents and affidavits filed with the board received on or about April 11, 1951. The letter refers to the accompanying documents.

The accompanying documents consist of an affidavit from one Harry Whitcomb, Edwin Soderlund, Joe Dani, Henry Dani, Edward Higdon, Louie H. Gerber, Fred Maes, E. C. Fryer, Jack Watson, Glen E. Woods, and then a document with many signatures with the endorsement:

“We, the undersigned, do hereby testify that we know that David Schuman is an ordained minister of the gospel. We have been present when he has preached in our Kingdom Hall, and we know that he participates in all phases of the ministry.”

There are about three pages of signatures. I will offer these and let your Honor inspect them.

The Court: Stipulated they may be admitted?

Mr. Brill: Yes, your Honor.

The Court: Admitted. [16]

The Clerk: United States Exhibit Number 8 in evidence.

(Thereupon the letter and enclosures referred to were marked United States Exhibit Number 8 in evidence.)

Mr. Karesh: As U. S. Exhibit next in order, a copy of a letter sent to the State Director of Selective Service under date of March 29, 1951, and a copy of a similar letter written to the National Director of Selective Service March 29, 1951. I offer these as one exhibit.

The Court: Will it be stipulated they may be admitted?

Mr. Brill: Yes, your Honor.

The Court: Admitted.

The Clerk: United States Exhibit Number 9 in evidence.

(Thereupon the copy of a letter referred to marked United States Exhibit Number 9 in evidence.)

Mr. Karesh: As U. S. Exhibit next, your Honor, is a card from the Watch Tower Bible and Tract Society to David Schuman. It was received at the same time the affidavits were received. I would like to show this to your Honor.

The Court: Any objection?

Mr. Brill: No objection, your Honor.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 10 in evidence.

(Thereupon the card referred to was marked United States Exhibit Number 10 in evidence.)

The Court: I do not see any date on this [17] card.

Mr. Karesh: That was received, your Honor, April 11, because in one of the letters of transmittal there is reference to that card—this document that you have on the top there and those affidavits. That was received by the board at the same time those affidavits were received.

As U. S. Exhibit next in order we would offer the special form for conscientious objectors completed by the registrant and filed July 2, 1951, in which he filled out Series B claiming exemption from both combat and non-combatant training in

service by virtue of his religious training and beliefs. There is a small pamphlet part of the questionnaire, of the form:

“The peoples’ greatest need. Public address by D. Schuman.”

And there are some attachments to complete the space which was inadequate in the form. I would like to read from this C. O. form.

“Do you believe in a Supreme Being? Yes.

“Describe the nature of your belief”—(continues reading from exhibit.)

The Court: Any objection?

Mr. Brill: No objection.

The Court: Admitted.

The Clerk: United States Exhibit Number 11 in evidence.

(Thereupon the special form referred to was marked United States Exhibit Number 11 in evidence.) [18]

Mr. Karesh: As U. S. Exhibit next in order, may it please your Honor, we offer a letter from the Coordinator Selective Service System Major Ferrill to Board 40 indicating that registrant is properly within the jurisdiction of Board 38 and not within the jurisdiction of Board 40. I would like to read the letter and offer it, of course. (Reading.)

The Court: Any objection?

Mr. Brill: No objection, your Honor.

The Court: It will be admitted.

The Clerk: United States Exhibit Number 12 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 12 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order, a letter of July 28, 1951, telling the registrant that his board is now 38 and no longer 40 and his registration with 40 is cancelled.

Mr. Brill: No objection.

The Court: Admitted.

The Clerk: United States Exhibit Number 13 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 13 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order we offer a statement made by the clerk August 2, 1951 (reading).

The Court: There being no objection—

Mr. Brill: No objection.

The Court: It may be admitted. [19]

The Clerk: United States Exhibit Number 14 in Evidence.

(Thereupon the statement referred to was marked United States Exhibit Number 14 in Evidence.)

Mr. Karesh: The next appropriate entry on the back of the questionnaire is, "7/28/51. Records of registrant transferred to local board 38, board having jurisdiction over area of registrant's address."

Mr. Brill: This has already been offered in Evidence, has it?

Mr. Karesh: The questionnaire, yes.

Mr. Brill: All right.

Mr. Karesh: That is on the back of U. S. Exhibit 2 with these attachments now.

Mr. Brill: All right. These now are the effective entries on the back of the questionnaire.

The Court: They have already been admitted.

Mr. Brill: Yes.

The Court: Either party may read any portion of it.

Mr. Karesh: "Minutes of actions by local board and appeal board:

"9/11/51, classified 1-A, vote three to nothing." This is, of course, a classification by Board 38.

"September 12, 1951, Form 110 mailed 9/21/51. Received letter from registrant requesting personal appearance before board bringing attorney and [20] several witnesses."

And as U. S. Exhibit next in order we would offer this letter of September 19 from the registrant received by the board September 21, 1951.

The Court: Any objection?

Mr. Brill: No.

(Mr. Karesh thereupon read the letter referred to.)

The Court: It may be admitted.

The Clerk: United States Exhibit Number 15 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 15 in Evidence.)

Mr. Karesh: The next entry on the back of the questionnaire:

“9/24/51. Mailed letter to registrant explaining the law does not permit attorney and witnesses to appear—registrant may appear alone.”

As U. S. Exhibit next in order I would offer the letter of September 24, 1951. (Reading letter.)

The Court: Admitted.

The Clerk: United States Exhibit Number 16 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 16 in Evidence.)

Mr. Karesh: The next entry on the back of the questionnaire:

“10/1/51. Mailed card to registrant explaining board will meet 10/8/51.”

As U. S. Exhibit next in order there as one Exhibit, two [21] affidavits filed with the board at the time of the personal appearance on October 8, 1951, one from Verne G. Reusch, presiding minister and one from Lyman H. Pinard. I will let your Honor glance at them.

The Court: Any objection?

Mr. Brill: No objection.

The Court: Admitted.

The Clerk: United States Exhibit Number 17 in Evidence.

(Thereupon the affidavits referred to were marked United States Exhibit Number 17 in Evidence.)

Mr. Karesh: The next entry is 10/8/51. Classified 1-A. Continued after personal appearance before board. Request as an ordained minister and request as a conscientious objector denied.

Vote two to nothing.

As U. S. Exhibit next in order, the stenographic transcript of the personal appearance before the members of the local board 38. This document, your Honor, is about nine pages in length. I would submit it.

Your Honor, may we not take the recess so I could assemble the other documents?

The Court: Is there any objection to the admission of this?

Mr. Brill: No objection. I would like to have the number of that. What will the number of that be?

The Clerk: Will it be admitted? [22]

The Court: Yes.

The Clerk: United States Exhibit Number 18 in Evidence.

(Thereupon the transcript referred to was marked United States Exhibit Number 18 in Evidence.)

Mr. Karesh: May we take a recess?

The Court: We will take a recess for ten minutes.

(Recess taken.)

Mr. Karesh: As U. S. Exhibit next in order a letter of October 22, 1952—sent October 17 and received October 22. It is a letter appealing the classification and also contains a request with a

letter to the California Appeal Board indicating that there were certain inaccuracies in the stenographic report, according to the registrant. We offer these documents, your Honor, as one exhibit. I would read the letter of October 17 received October 22, then I would submit to your Honor this rather lengthy letter to the Appeal Board in which he indicates that there are some errors in the stenographic record.

(Reading letter of October 17, 1951.)

We might as well, your Honor, offer the so-called corrections of the stenographic transcript stated by the registrant as a separate exhibit. I would like to show it to your Honor.

The Court: Let us take one at a time then.

Mr. Karesh: All right.

The Court: There are two exhibits. We can't have two at one time. Any objection to the one the clerk now has in his [23] hands?

Mr. Brill: No, your Honor.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 19 in Evidence.

(Thereupon the letter of October 17, 1951, referred to was marked United States Exhibit Number 19 in Evidence.)

Mr. Karesh: That is one, and the U. S. Exhibit 20, I presume, I would like to submit to your Honor for your reading.

The Court: Any objection to that?

Mr. Brill: No, your Honor.

The Court: It may be admitted.

The Clerk: United States Exhibit 20 in evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 20 in Evidence.)

Mr. Karesh: The next entry on the back of the questionnaire:

“10/22/51. Received letter from registrant requesting appeal of classification; registrant also stated summary made by clerk of his personal appearance was not accurate and requested that appeal not be sent to appeal board until his personal summary can be included.

“10/30/51. Received letter from registrant for appeal board, with his own summary of his personal appearance before local board members 10/8/51.”

As U. S. Exhibit next in order we offer the covering letter which sent these corrections or the corrections as the registrant [24] stated of the stenographic transcript of the board.

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit 21 in Evidence.

(Thereupon the covering letter referred to was marked United States Exhibit 21 in Evidence.)

Mr. Karesh: The next entry on the questionnaire:

“11/1/51. The entire file of registrant forwarded to Appeal Board.”

Next entry: “11/8/51. Appeal Board Panel No. 3 reviewed this file and determined that the registrant should not be classified in either 1-A-O or 1-O, by a vote of 3-0. under the circumstances set forth in subparagraphs (2) or (4) of Section 1626.25 of the Selective Service regulations. Signed C. E. Patty, chairman, Appeal Board Panel No. 3.”

As U. S. Exhibit next in order we would offer the change of address sent by the registrant to the local board. He is now living at 44 Aztec Street. It was received by the board January 8, 1952.

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 22 in Evidence. [25]

(Thereupon the change of address referred to was marked United States Exhibit Number 22 in evidence.)

Mr. Karesh: A group of hand bills indicating the registry is giving certain speeches, may it please your Honor, we will offer as one Exhibit. Some were filed in '52, some in the latter part of '51. They speak for themselves.

The Court: Any objection?

Mr. Brill: No objection.

The Court: They may be admitted.

The Clerk: United States Exhibit Number 23 in Evidence.

(Thereupon the hand bills referred to were marked United States Exhibit Number 23 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order we would offer a copy of an order to report for armed forces physical examination, the original of which was mailed February 13, 1952, directing the registrant to report for physical examination in San Francisco the 29th of February, 1952.

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 24 in Evidence.

(Thereupon the copy of an order referred to was marked United States Exhibit Number 24 in Evidence.)

Mr. Karesh: The entry of the minutes and attached sheet to the questionnaire:

“2/13/52. Mailed SSS Form 223, order to report for [26] preinduction physical examination 2/29/52.”

Another entry: “3/17/52. DD Form 62 mailed (Certificate of Acceptability). Acceptable.”

We offer as U. S. Exhibit next in order this Certificate of Acceptability, copy of which was mailed to the registrant. It certifies that on February 29, 1952, the registrant was found fully acceptable for induction into the armed services.

The Court: No objection?

Mr. Brill: No objection, your Honor.

The Court: Admitted.

The Clerk: United States Exhibit Number 25 in Evidence.

(Thereupon the Certificate referred to was marked United States Exhibit Number 25 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order, may it please your Honor, we offer copy of a Notice of Hearing sent by one Earnest E. Williams, Hearing Officer, to the registrant, April 1, 1952, directing him to report for hearing on his claim as a conscientious objector April 15, 1952, in the Post Office building in San Francisco.

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted. Hearing for what?

Mr. Karesh: Hearing on his claim as a conscientious objector.

The Court: In April? [27]

Mr. Karesh: '52.

The Court: After the order for induction?

Mr. Karesh: That was the physical. The order for induction has not come.

The Court: Admitted.

The Clerk: United States Exhibit Number 26 in Evidence.

(Thereupon the copy of Notice of Hearing referred to was marked United States Exhibit Number 26 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order we

would offer the Report of Hearing conducted by the Department of Justice pursuant to Section 6 (J) of the Selective Service Act of 1948, in re: David Don Schuman (conscientious objector). Appeal from Local Board No. 38 to Appeal Panel No. 3, file No. 4-38-30-611. I would like to read it to your Honor.

The Court: Any objection to its admission?

Mr. Brill: No objection.

(Mr. Karesh thereupon read the document.)

The Court: It will be admitted.

The Clerk: United States Exhibit Number 27 in Evidence.

(Thereupon the Report of Hearing referred to was marked United States Exhibit 27 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order, we would offer a letter from the Department of Justice signed by T. Oscar Smith, special assistant to the Attorney General, to the Appeal Board at San Francisco, Panel 3, with relation to the claim of David Don Schuman as a conscientious [28] objector. I would like to read it. (Reading.)

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 28 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 28 in Evidence.)

Mr. Karesh: "8/11/52"—reading from the minutes of action on the back of the questionnaire: "Entire file of registrant received from Appeal Board—Retained in 1-A."

At this time, may it please your Honor, we would offer the individual appeal record, SSS Form 120. It shows the action of the local board as well as the minutes of action by the Appeal Board. (Reading.)

The Court: Any objection?

Mr. Brill: No objection.

The Court: It will be admitted.

The Clerk: United States Exhibit Number 29 in Evidence.

(Thereupon the appeal record referred to was marked United States Exhibit Number 29 in Evidence.)

Mr. Karesh: I will now read the next entry on the back of the questionnaire:

"8/11/52. Form 110 mailed."

That is the notice of the action of the Appeal Board.

"8/12/52"—the next action—"mailed SS Form 252, [29] Order to report for Induction 8/28/52."

As U. S. Exhibit next in order we would offer this SS Form 252, Order to report for Induction. (Reading.)

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit 30 in Evidence.

(Thereupon the Form 252 referred to was marked United States Exhibit 30 in Evidence.)

Mr. Karesh: It is stipulated, your Honor, that the registrant, in compliance with the order on the 28th day of August, reported for induction at the San Francisco Armed Forces Induction Station, and on the 28th day of August, 1952, he completed all the process of induction except the final step which would have changed him from a civilian to a soldier.

It is stipulated that if the military officials were here, they would testify that David Don Schuman was read the ceremony, was told that the step forward would constitute his induction into the armed forces; that his name was read; that he was told to step forward to be inducted and that he knowingly refused to step forward and be inducted into the armed forces.

It is further stipulated that the military officials would testify that the registrant was given a second opportunity and he was told that the step forward would constitute his induction; he was read the ceremony, and his name was called; he was [30] asked to step forward; he refused to step forward and be inducted into the armed forces of the United States, all of this occurring at San Francisco, California, the 28th day of August, 1952. Is that the stipulation?

Mr. Brill: That is the stipulation, correct, your Honor.

Mr. Karesh: Will your Honor excuse me for just

a moment while I talk to the agent? Pardon me, your Honor. I will be right with you.

As U. S. Exhibit next in order, may it please your Honor, we offer the minutes of the Board meeting of October 8, 1951, and it is a summary of the stenographic report. I did not offer it, but counsel says it should be offered as part of a file and I will so offer it.

The Court: Any objection?

Mr. Brill: It was at our request that it is being offered.

The Court: All right.

(The document was read by Mr. Karesh.)

The Court: Let it be admitted.

The Clerk: United States Exhibit Number 31 in Evidence.

(Thereupon the summary of report referred to was marked United States Exhibit Number 31 in Evidence.)

WILLIAM G. HARRY

called as a witness on behalf of the Government, sworn.

The Clerk: Will you please state your name, address, and occupation to the Court. [31]

A. William G. Harry, special agent, Federal Bureau of Investigation, San Francisco, California.

Direct Examination

By Mr. Karesh:

Q. Do you know the defendant in this action, Mr. Schuman? A. Yes.

(Testimony of William G. Harry.)

Q. When was the first time you saw him, and where?

A. On August 28, 1952, at the U. S. Induction Station.

Q. San Francisco Armed Forces Induction Station? A. That is correct.

Q. 30 Van Ness Avenue, San Francisco?

A. 30 Van Ness Avenue.

Q. Did he give you a signed statement?

A. He did.

Q. Who witnessed it?

A. I witnessed it and Special Agent Daniel Gill, Jr.

Q. Also of the Federal Bureau of Investigation?

A. Also a special agent.

Q. Were any promises of any kind or character made to him? A. No promises at all.

Q. Is the statement in your handwriting or in his handwriting?

A. The statement is in my handwriting except the last paragraph.

Q. What is the technique of taking a statement? How does it happen to be in your handwriting?

A. Usually we write it out in our handwriting to save time, [32] and the person is allowed to read it and make any corrections.

The Court: Never mind the technique. What did you do this time?

Q. (By Mr. Karesh): What did you do here?

A. The same procedure.

Mr. Karesh: I don't think you have answered.

(Testimony of William G. Harry.)

The Court: Tell us what you did here. Never mind what the usual procedure is. What did you do?

A. I wrote out the statement after interviewing Mr. Schuman and wrote down the things that he told me and the answers he had given to my questions. Then I gave the statement to him to read and to attest at the end that he had read it and it was true and correct.

Q. (By Mr. Karesh): In other words, he told you the facts and you wrote them down?

A. Yes.

The Court: Did he read it afterwards?

A. Yes.

Q. Before he signed it?

A. Before he signed it.

Mr. Karesh: I would like to offer the statement, your Honor.

Mr. Brill: No objection.

The Court: It may be admitted.

(Mr. Karesh thereupon read the [33] statement.)

The Clerk: United States Exhibit 32 in evidence.

(Thereupon the statement referred to was marked United States Exhibit 32 in evidence.)

Mr. Karesh: I have no other questions of this witness.

Mr. Brill: No questions.

Mr. Karesh: This is the Government's case, your Honor.

Mr. Brill: If the Court please, we wish to make a motion. However, in other cases that have been handled by me, we reserved our motion until the completion of the defense, and if that would be agreeable to the Court, we will do so in this case, if we may.

The Court: You wish to make a motion at the end of the case to be considered as of this time by the Court?

Mr. Brill: Yes, your Honor, yes.

The Court: Permission granted.

Mr. Brill: At this time——

The Court: However, if you will designate the motion——

Mr. Brill: It is a motion for dismissal and for acquittal.

The Court: You are making a motion now for dismissal and you will present the argument, and you want that considered as having been made at this time and the Court to consider it at the end of the case?

Mr. Brill: That is right, your Honor.

The Court: Motion for dismissal is made at this time and will be argued and passed on at the end of the case as of this [34] time.

The Clerk: Yes, your Honor.

Mr. Brill: At this time we are asking Mr. R. J. Abbatichio, agent in charge of the Federal Bureau of Investigation, 422 Federal Office Building, to produce, pursuant to the subpoena issued and served upon him, the report of the agent or agents of the Federal Bureau of Investigation which is in

writing which was used by the Hearing Officer of the Department of Justice and the Assistant Attorney General in their investigation and determination of the claim of deferment from training and service under the Selective Service Act of 1948 as a minister and a conscientious objector made by David Don Schuman, Selective Service Number 4-38-30-611, Local Board Number 38, San Francisco, California, now in his custody.

Mr. Karesh: May it please your Honor, is there a return of service on Mr. Abbaticchio?

Mr. Brill: We have here a——

Mr. Karesh: Mr. Abbaticchio was never served.

The Court: Well, have you such papers in your possession, Mr. Karesh? If you have, produce them.

Mr. Karesh: Your Honor, we cannot produce them. We cannot produce the FBI file. However, there has to be proper service. Under instructions from the Attorney General, had Mr. Abbaticchio been present, he would have declined to produce them.

Mr. Brill: I have here an affidavit of service upon Mr. [35] Abbaticchio. I might say to the Court that I received a phone call from his office saying that the papers would be here, but that they would decline to produce them at this time.

The Court: Is he here?

Mr. Brill: I don't know.

Mr. Karesh: Mr. Abbaticchio is not here. Mr. Abbaticchio was not served.

Mr. Brill: We will file this affidavit of service.

Mr. Karesh: I would like to see it.

The Court: Can't you gentlemen make up your mind whether this man was served?

Mr. Karesh: Yes, your Honor; Mr. Abbaticchio was not served. I don't know who made this service on him. He was not personally served.

The Court: Let's see that.

Mr. Brill: As I have said to the Court before, I received a phone call from Mr. Abbaticchio's office saying that an agent would be here, but they would refuse to present these papers to the Court pursuant—

The Court: I am more concerned at this time with this other matter, whether or not he was served.

Mr. Karesh: He was not served.

The Court: How could that be?

Mr. Brill: Well—

Mr. Karesh: They may have left it at the desk, but that [36] is not personal service on Mr. Abbaticchio. It makes a statement that there was personal service.

The Court: Where is Mr. Abbaticchio?

A Gentleman in the Courtroom: I don't know, sir.

Mr. Brill: Were you the gentleman we called at the office about this matter?

Mr. Karesh: Let's don't conduct this—

The Court: Just a moment. Do you want to file this?

Mr. Brill: Yes, your Honor.

Mr. Karesh: May it please your Honor, we challenge that.

The Court: You may challenge it. On the face of it, it is in order. I have nothing else to go by. I have here an affidavit of service. It will be filed.

Mr. Karesh: We move to strike it out. The man isn't present. We challenge that. We know that Mr. Abbaticchio was not personally served.

The Court: You have to present evidence. We have an affidavit here before us, an affidavit of service. The man has been served, according to the record. If you desire to produce evidence to the contrary, you may do so.

Mr. Karesh: We are not going to produce the record, because Mr. Abbaticchio was not served. If your Honor wishes to issue——

The Court: If you want to make a motion to strike the service which appears before us, you will have to produce evidence. [37] You can get Mr. Cornish here—Mr. or Mrs. Cornish, who made the service. We cannot merely accept the statement of counsel of the fact as to whether another person was served—as to whether you were served, Mr. Karesh——

Mr. Karesh: I was not served.

The Court: Or Mr. Brill. Your statement is not sufficient because you are both officers of this Court, a statement that some other person was served would not be sufficient.

Mr. Karesh: It was always my opinion that if there was any challenge to the affidavit that the person filing it had the burden; we don't have to offer contrary proof.

The Court: The affidavit on the face of it states it was served.

Mr. Karesh: We have a right to ask him the question whether it was served.

The Court: Bring him in.

Mr. Karesh: We don't know where Mr. Abbaticchio is.

The Court: Where is Mr. Abbaticchio?

Mr. Brill: We perhaps can solve this entire matter by now requesting that the Court order the United States Attorney to produce the records which were requested in that subpoena. I was advised——

The Court: You make a motion for the production of records. I will hear from you, Mr. Karesh, in opposition to the motion for the production of the records. Do you know what documents [38] he is talking about?

Mr. Karesh: I do.

The Court: What is your position?

Mr. Karesh: He can't make me produce the documents. They are not my documents.

Mr. Brill: Yes, they are the FBI records.

The Court: They are in your possession, are they not?

Mr. Karesh: At this time.

The Court: Mr. Karesh has told you he has the possession of the documents. Mr. Karesh states he has opposition to the motion. He may address the Court orally. Go ahead.

Mr. Karesh: The United States Attorney has no authority to produce any FBI records. The person to produce them, if at all, would have to be the head of the office. If he came here he would decline to

produce them under the instructions of the Attorney General. As a matter of fact, even if he had come before the Court properly served, we would have offered the decision of *M. Upton vs. United States*, 194 Federal 2nd 508, which is clearly in point, a decision of the 6th circuit. I will show it to your Honor. That says he doesn't have to produce them even if properly served.

The Court: I am merely concerned with the fact that he isn't here at this point.

Mr. Brill: Have you finished, Mr. Karesh?

Mr. Karesh: I am now informed that Agent Nourse was the [39] man that perhaps was served. He served him like serving the clerk of this Court by serving the man on the complaint desk. We will prove that that service was not made on Mr. Abbatichio I would like to have the maker of the affidavit here.

The Court: I am not concerned with that. What are you going to do? Mr. Brill has asked you for the production of certain documents and you are refusing the production of those documents. The Court will hear further from you on that subject alone. He is asking for the production of certain documents which you refuse.

Mr. Karesh: If your Honor please, the authority to produce FBI reports is in the Department of Justice; it is under instructions of the Attorney General. You can't force a United States Attorney to produce an FBI report when the report itself says it is confidential.

The Court: Have you finished your presentation?

Mr. Karesh: Yes, your Honor.

The Court: Mr. Brill, you have produced an affidavit that Mr. Abbaticchio has been served?

Mr. Brill: That is correct.

The Court: Do you need an attachment for him to appear at 2 o'clock or will he come voluntarily at 2 and at that time we will discuss what is to be done?

Mr. Karesh: I don't know—

The Court: Service has been made upon the man, according [40] to the records.

Mr. Karesh: I am certain this affidavit on file is a false affidavit.

The Court: That may be. It may be. If the affidavit is false, this Court will act accordingly. If you want me to proceed upon the affidavit, Mr. Brill, I will.

Mr. Karesh: May I ask the agent, where is Mr. Abbaticchio?

The Court: Yes, go ahead. You can find out before we proceed further. The process of this Court can be used to the fullest extent to get any witnesses here.

Mr. Karesh: Would you make a phone call to the office? Your Honor, we don't know where Mr. Abbaticchio is. If he has been transferred whether he is in town we don't know. But I do feel that, in fairness to Mr. Abbaticchio, we should try to get hold of the man that we say actually was served. We are not going to bring back Mr. Abbaticchio

from Salt Lake City where he has been transferred on the basis of an affidavit that we conclude is not so. We will try to get Mr. Abbaticchio—

The Court: Before we proceed, Mr. Brill, do you want to withdraw the affidavit, for this reason, because if there is anything the matter with that affidavit, this Court is not going to allow affidavits to be filed here that are not true.

Mr. Brill: I will say this to the Court: I received a phone call from the Federal Bureau of Investigation that—the man's name I don't recall; I just asked the agent here in [41] Court if he was the man who phoned me. The conversation was to this effect: "We have received a subpoena. We will have the records in Court. However, an agent will be there and we will refuse to produce them for the perusal of the Court." That was the conversation. He also advised me that Mr. Karesh has a copy of the record, and I certainly assumed that they would have them there. I just made a motion to the Court requesting that Mr. Karesh as Assistant United States Attorney produce those records which he has in his possession before the Court. I don't want to make an issue of Mr. Abbaticchio. I don't know whether the man was served, but I did receive that phone call. Now if your Honor wishes to pursue my motion for production of those records, which I have been informed will be in Court this morning—that was the only object of this subpoena.

Mr. Karesh: I might say that I instructed the Federal Bureau of Investigation that unless Mr.

Abbatichio was personally served himself that nobody else was to bring the records; that it would have to be Mr. Abbatichio. That is why I know he wasn't served.

The Court: If there was some person served, whoever it was, if he had these records in his possession, he should be here this morning and we would then determine whether they would be admissible.

Mr. Karesh: He doesn't have the record in his possession. He has no right to bring in the records any more than my [42] secretary can come to Court with the records.

The Court: What I am concerned with is the statement that some person was served. Why wasn't that person here, whoever it is?

Mr. Karesh: Does somebody appear when the subpoena is addressed to a particular person?

The Court: Was there no other person specified?

Mr. Brill: No, your Honor.

Mr. Karesh: No, it is just R. J. Abbatichio.

Mr. Brill: I might say to the Court, with Government offices such as the Federal Bureau of Investigation, the procedure for many years has been to address the subpoena to the head of the office. The head of the office never appears in Court in these cases, he sends a deputy. When I received the phone call, I felt sure that it would be carried out in that manner. This isn't the first case of this kind that I have had, nor is it the first time that we have had this controversy over records, but this is the first time that Mr. Karesh has taken the atti-

tude that we must serve this man personally before he will come in with the records. I now make a request upon the court, a motion that Mr. Karesh be instructed to produce those FBI reports which I think he has in his possession and they are in Court today.

Mr. Karesh: If I were to produce any such records, I would be in flagrant violation of instructions from the Department of [43] Justice and subject to dismissal.

Mr. Brill: You have them with you today?

Mr. Karesh: I don't have them in my file today, in the first place. Even if I did, you wouldn't be entitled to them, and you can't make me produce confidential records.

The Court: What are these records, Mr. Brill, so that we can determine exactly what we are talking about? What is it that you are asking for?

Mr. Brill: Government's Exhibit Number 27 purports to be a report of a hearing conducted by the Department of Justice pursuant to Section 6(j) of the Selective Service Act of 1948.

The Court: Just a moment. I have it here, Exhibit 27. Let's see what it is.

Mr. Brill: There is a preliminary statement and then there is a statement of facts upon which the Hearing Officer makes his decision. In the statement of facts there is referred to the Federal Bureau of Investigation reports. The reports do not disclose the names of the persons who were interrogated nor the statements made by them, but merely the opinion or the conclusion drawn by the agent,

who then turns the report over to the Hearing Officer, and upon the basis of that report and the oral testimony and the production of the registrant before him, he comes to his conclusion. Now it is our position——

The Court: You are speaking about Page 2, paragraph 2, of the Exhibit 27? [44]

Mr. Brill: That is correct.

The Court: Just a moment. Let me read it.

All right, now, what is it? What reports are there that you are talking about that you want if you could have them?

Mr. Brill: We want the Federal Bureau of Investigation reports showing the names of the persons who were interrogated so that we may have an opportunity to cross-examine them. This is a criminal trial that we are now before your Honor on. Under the Federal Constitution we have the right to confrontation of witnesses. These were reports or statements made by persons unknown to us. We had no opportunity to cross-examine them to test the veracity or verity of the statements made. Upon the basis of those statements the classification of 1(a) was given, which ultimately resulted in this criminal prosecution. It is our contention that under the Federal Constitution Sixth Amendment, which expressly provides for the right to trial by confrontation of witnesses, we have been deprived of that through the procedure that has been followed, we have a right to know the names of the witnesses who were interviewed by the Federal Bureau of Investigation for that reason.

The Court: I want to ascertain definitely what it is you are asking for. You want the FBI report showing the names of persons interrogated?

Mr. Brill: That is correct.

The Court: Does that cover the field of what you are asking [45] for, so that I will be able to study upon it and pass upon it at one time?

Mr. Brill: That is correct.

Mr. Karesh: May I—

The Court: Wait a minute. Mr. Brill hasn't finished.

Mr. Karesh: I thought he had finished; I'm sorry.

The Court: I will give you a lot of time to talk. Just take one at a time.

Mr. Brill: In line with that, the report, which is the Federal Bureau of Investigation report which was the basis of this decision, should be produced in court so that we may have an opportunity to cross-examine the agent himself who made the report to determine whether or not he was biased, whether or not the report which he made and his conclusions are truthful. The entire report should be brought before the court and we should have a right to cross-examine the agent and the persons whom he interrogated with relation to this report which was the foundation of the Hearing Officer's ultimate conclusion in this matter.

The Court: Well, there are separate things. One is you are asking for the entire report.

Mr. Brill: That is correct.

The Court: Aside from asking for the entire report, you would like to have the names of the persons interrogated?

Mr. Brill: That is correct. [46]

The Court: What else aside from the entire report, that is, if you can have it?

Mr. Brill: That would give us all the names.

The Court: If you cannot have the entire report, what particular matters would you like to have?

Mr. Brill: Then we would like to have the agent's name—agent or agents' names, and the persons who were interrogated.

The Court: Anything else?

Mr. Brill: No, I think that would cover it all, your Honor.

Mr. Karesh: May I say, your Honor, that this same problem was raised before his Honor Judge Roche. Proper service was made. The agent came in with the report. Judge Roche looked at the report and said "No, Mr. Covington, the lawyer who is the general counsel for Selective Service will not see these reports. They have the names of confidential informants."

This is not the case of a man accused by some one. A procedure has been set up in the Department of Justice. The effect of the disclosure of confidential memoranda is to destroy the effectiveness of this act.

This problem has been squarely passed upon by the Sixth Circuit and it was squarely passed upon by his Honor Judge Roche.

If this man had been properly served he would have been here. Had your Honor wanted a report, it would have been shown to your Honor and I am confident your Honor would have decided in the same way that his Honor Judge Roche did who the question was [47] passed to directly. But under no stretch of the imagination can the United States Attorney be forced to give FBI reports in direct contravention of instructions of the Department. The proper person is the head of the office, who would first decline to give them to you under the instructions of the Department.

The Circuit Court has gone into this very question in a contempt proceeding arising in Illinois, which was reversed by the Supreme Court.

But we say that where they attempt to secure information which under the authorities they are entitled to have, we have a right to demand strict compliance with the statute requiring personal service upon Mr. Abbaticchio himself.

The Court: That may be, but I wanted to hear anything further you have to offer on the other subject, assuming that Mr. Abbaticchio does come here with the documents in question. I am now hearing discussion——

Mr. Karesh: We rely on the decision of the Sixth Circuit Court of Appeals squarely in point; and I may say the question of Judge Roche's ruling of refusal to disclose the report is now before the Court of Appeals for the Ninth Circuit and is to be argued November 17. The Chief Judge has ruled on that, and the Sixth Circuit has ruled on that.

We rely on that. They are not entitled to these reports.

The Court: At this time we will take a recess until 2 o'clock.

(Recess taken.) [48]

October 17, 1952, at 2:00 P.M.

Mr. Karesh: May it please your Honor, my superior, the United States Attorney, Mr. Tramutolo, informs me that he was just now served with a subpoena to produce certain documents. At this time we would move to quash the subpoena because it appears from the subpoena that it is defective on its face for it asks the production of FBI records. Obviously the person to be subpoenaed would be the FBI.

The Court: Has he them in his possession?

Mr. Karesh: I have.

The Court: Have you the documents in your possession?

Mr. Karesh: I have the documents. Mr. Tramutolo does not have them, but of course, as my superior, he would have authority over the documents. But I would ask your Honor to rule on the motion to quash the subpoena as being faulty on its face. I would like to offer it and show it to your Honor.

(Handing document to Court.)

The Court: It does not state here in the subpoena that the papers are in the possession of the person to whom it is directed.

Mr. Brill: I don't believe, your Honor, that it

is necessary to state in so many words that they are in his possession. If as a matter of fact they are in the hands of Mr. Karesh they are in fact in his possession. If he does not have them, he may appear in court and say that he doesn't at [49] present.

The Court: Well, if the papers are in the possession of Mr. Karesh, I would suggest that you give them to the clerk so I can examine them to determine whether or not they would be admissible in the matter. Then I can determine whether they are admissible.

Mr. Karesh: I have not been served.

Mr. Brill: We now make the request.

The Court: Service does not have to be upon you. A demand upon you by the opposing counsel for documents in your possession would be sufficient. You can produce the documents. We will then determine whether they are evidence in the matter or could be evidence.

Mr. Karesh: Well, if the witness——

The Court: There is no way for the Court to determine whether or not they are admissible in evidence without examining them. I fail to see at this moment how they could be admissible, how they could be evidence in this matter, for this reason: that the report to which you referred, Mr. Brill, sets forth the ground upon which the board made its classification. If any of those grounds are not true—I mean if any of those statements are not true, you can produce evidence to refute them, of course. But from your own statement, the only thing you disagree with is the conclusion and not the facts.

Mr. Brill: No, your Honor. I haven't made myself clear. [50] I would like to clarify it at this time. The Hearing Officer used certain reports which were given him; no names were disclosed; the exact information which was obtained was not disclosed; the persons to whom it was disclosed were not mentioned in the ultimate report which he made and upon which the classification was made. We have a right in a criminal case under the Sixth Amendment to the Federal Constitution to be confronted with the witnesses against us. All of these steps which were taken by the draft board and the appeal board and the Hearing Officer are steps leading up to the ultimate prosecution of this case. This is a criminal case, and we have, under the constitution and under the cases, the right to be confronted with the witnesses against us. They were in effect witnesses against us because they produced a recommendation by the Hearing Officer and by the Attorney General for a refusal to give us the classification we thought we were entitled to. Therefore, in order to refute that—we can't refute the statement made which says "we are informed such and such" unless we have the information, where the information came from, what the information is and who made the statement. And that is our position.

The Court: Mr. Clerk, let me have the Exhibit Number 27, I think it is. Which of these statements in this report would you want to refute under Exhibit 27?

Mr. Brill: We have no way of knowing without

knowing what [51] the statements were, without having the evidence produced; we have no way of knowing which statements were used in order to get the adverse decision which ultimately was made.

The Court: The statements are here. Which of these statements in these two pages do you wish to refute?

Mr. Brill: It may be that the statement which appears there—let me look at the exhibit.

The Court: Not the conclusion, but the statements of fact.

Mr. Brill: Yes.

The Court: The conclusion, of course, is a matter of opinion; but which one in this page and a half statement of facts do you disagree with?

Mr. Brill: For example: "A former landlord stated that he was somewhat of a 'smart alec.'" We have a right to know who that former landlord was.

The Court: This court would not permit testimony either for or against on that.

Mr. Brill: It is in the record.

The Court: We are only concerned with two things in this case, Mr. Brill: First, were the forms complied with; that is, was he given the regular hearing that he is entitled to? Were the notices required by law given? Second, was there any basis in fact? If there is any basis in fact, all the reports that you could possibly produce this court couldn't pass upon, even if you produced a preponderance of the evidence to the contrary. [52]

Mr. Brill: Of course all of this goes to the ques-

tion of whether or not there is any basis in fact. If counsel will stipulate that nothing in these statements is sufficient to justify the finding that was ultimately made, we will be willing to withdraw our request.

The Court: Mr. Brill, as a matter of law, the fact that he became a member of Jehovah's Witnesses after he had been registered is in itself a basis of fact from which a reasonable conclusion might be drawn. Whether the court would draw it or not is unimportant. This court does not sit in this matter *ab initio*.

Mr. Brill: Yes, I understand that, your Honor.

The Court: I haven't that power if I wanted to exercise it. If the draft board, the selective service board, and the appeal boards acted in the manner provided by law and if there was any basis in fact, this court has no choice in this matter. Do you disagree with that statement of the law?

Mr. Brill: That is a correct statement as the law now exists, your Honor.

The Court: I will take a look at the report that you asked for, if you will give it to the clerk, and I will then determine whether or not there is any reason why it should be introduced.

Mr. Karesh: So that Mr. Tramutolo may be excused, your Honor, I will state the subpoena having been directed to my superior— [53]

The Court: I would suggest that you withdraw the other subpoena, Mr. Brill.

Mr. Brill: I would like to do that.

The Court: I will state further that you made a

statement this morning that it was a common practice for someone to be served, which may be true, but it isn't a common practice that an affidavit be made when one man is served when another is served, not in this court. You made that statement.

Mr. Brill: That is right.

Mr. Karesh: I will accept service of the subpoena if your Honor will permit so Mr. Tramutolo may be excused.

The Court: The subpoena as far as Mr. Tramutolo is concerned is discharged.

Mr. Karesh: Your Honor asked me with relation to the reports. May I, for the record, repeat Section 3229—that is Department of Justice Order 3229, which reads as follows, it is an instruction to us, Department of Justice Order 3229, filed May 2, 1946, 11 Federal Register 4920, reading:

“All official files, documents, records, and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. [54] No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

“Whenever a subpoena duces tecum is served to

produce any of such files, documents, records, or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer there to and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.”

Supplement Number 2 to that order, dated June 6, 1947, provides in part:

“To all United States Attorneys:

“Procedure to be followed upon Receiving Subpoena Duces Tecum.

“Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, or information, he should at once inform his superior officer of the requirements of the subpoena and ask for instructions from the Attorney General. If in the opinion of the Attorney General circumstances or conditions make it necessary to decline in the interest of [55] public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with the instructions of the Attorney General in refusing to produce the records. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order

Number 3229) and explaining that he is not permitted to show the files.

“If questioned, the officer or employee should state that the material is at hand and it can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney’s office or some similar place of safe keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

“The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its [56] business, and the custody, use, and preservation of the records, papers, and property appertaining to it.” [56-A]

If the court please, in conformity with Supplement Number 2, dated June 6, 1947, we submit to the court for its inspection these reports and assert once more that they are not material to this inquiry, and furthermore, it would be in the interest of public policy not to disclose the names of the informants. And once more I would call your Honor’s attention to the case of *United States vs. Lloyd Luke Knox*, a similar case, where a demand was made before his Honor Judge Roche, an agent of the FBI came up, Mr. Backman, and submitted the record to the court for his inspection, and the court looked it over and refused to permit it to go

into evidence or any inquiry thereon. This case is a like case.

We do call your attention to the Imboden case which we cited to your Honor. I will now pass these to your Honor for his inspection. There are two reports, one from the Seattle office and one from the San Francisco office.

The Court: I merely call the attention of the record to the fact that Mr. Tramutolo, United States Attorney, has been present in court here prior to the time he was discharged. He appeared in response to the subpoena and the subpoena was discharged, as I have said.

Mr. Karesh: Yes.

Mr. Brill: For the purpose of the record, I should like to call the court's attention to two cases on this question: Joint Anti Fascist Refugee Committee vs. McGrath, 341 US 123, [57] and Bailey vs. Richardson 341 US 918, on the point involved here.

The Court: In order that the court may have an opportunity to read this and determine the ruling upon the matter, we will now take a recess for ten minutes.

(Recess.)

The Court: The court rules against the request of defendant and returns this to the United States Attorney. The court finds there is nothing in it as far as the issues of this case are concerned.

Mr. Brill: Shall we proceed at this time?

The Court: Proceed.

Mr. Brill: We have served a subpoena on Mr. Backman of the FBI.

Mr. Karesh: Do you wish him?

Mr. Brill: No, the subpoena was for the same documents, and there is no need——

Mr. Karesh: May he be released from that subpoena?

Mr. Brill: Yes, certainly.

Mr. Karesh: Mr. Backman of the FBI was served at the recess.

The Court: By stipulation he may now be excused?

Mr. Brill: Yes.

Mr. Karesh: Yes. Thank you.

Mr. Brill: Call Mr. Joseph Bonzani. [58]

JOSEPH BONZANI

called as a witness by defendant, sworn.

The Clerk: Would you please state your name, address, and occupation to the Court?

A. Joseph C. Bonzani, Manager, Bank of America, 16th and Mission Branch, 2001 Mission Street, San Francisco.

The Clerk: And your residence, sir?

A. 1688 Dolores.

Direct Examination

By Mr. Brill:

Q. Mr. Bonzani, you are a member of Board 38?

A. Yes, sir.

(Testimony of Joseph Bonzani.)

Q. Having to do with the classification under the Selective Service Act, is that correct?

A. That is correct.

Q. And you were a member of that board during the month of October, 1951? A. Yes, sir.

Q. Do you have any independent recollection of having been a member of that board at a personal hearing had for the defendant in this case, David Schuman? A. Yes.

Q. Do you have a personal recollection of that?

A. Yes.

Q. I show you here Government's Exhibit Number 31 and ask you whether you have ever seen that document. [59] A. Yes, sir.

Q. I notice that the signature in the lower right hand corner is typed with the name "J. Bonzand"?

A. That is right.

Q. Is that right? A. That is correct.

Q. Is that your signature? A. No.

Q. Was there an original of that or was there another copy of those minutes which you did sign?

A. This was the only one we have.

Q. That is the only one you have?

A. Yes.

Q. Did you see that at or about the time it was typed? A. At the following meeting.

Q. The following meeting? A. Yes.

Q. And did you read it over? A. Yes.

Q. And all of the facts set forth in that truly represented the minutes as you recalled them at that time of the hearing had, is that correct?

(Testimony of Joseph Bonzani.)

A. This was taken by the clerk of the board.

Q. Pardon.

A. This was taken by the clerk of the [60] board.

Q. I notice at the end of the minutes it is stated "Time elapsed in hearing one hour five minutes. Retained in 1-A, request for deferment as student-minister and conscientious objector denied."

A. Right.

Q. Was there a request for a deferment as a student-minister?

Mr. Karesh: Objected to on the ground, your Honor, that the best evidence are the records themselves. We have a stenographic report.

The Court: Stenographic report?

Mr. Karesh: Yes, that is merely a summary of the stenographic notes of everything that occurred.

The Court: He is entitled to show by the record—

Mr. Karesh: May I say this, your Honor: Under the decisions, no matter what happened before the local board, it now becomes immaterial. For that reason I should now like to cite a decision of the Ninth Circuit which is binding on your Honor. Regardless of what happened before the local board, the decision of the Board of Appeal supersedes this, and that is why we have the Board of Appeal set up. I should like to read the decision to your Honor. I have it here in a brief that I have heretofore submitted before the Circuit Court in an-

(Testimony of Joseph Bonzani.)

other case. If I might have your Honor's indulgence for a moment—

The Court: All right.

Mr. Karesh: This is the decision of the United States [61] Court of Appeals for the Ninth Circuit, *Cramer vs. France*, 148 Federal Second 801, and I am quoting the case:

“Moreover, we think the trial court is right in its assumption that appellant, having taken an appeal from the local board to the appeal board and secured a ruling of the latter as to his classification, cannot now complain to the court concerning the conduct of the local board. The action of the board of appeals completely supersedes the action of the local board in classifying appellant, although the classification is the same.”

In *Falbo vs. United States*, Mr. Justice Rutledge in a concurring opinion, 320 US page 555, said as follows:

“If, therefore, the local board's order was invalid originally for the reason claimed, as to which I express no opinion, whatever defect may have existed was cured by the Appeal Board's action.”

And may I say that as recently as November 21, 1951, in *Cox vs. Wedemeyer*, Number 12565, I do not have the Federal Second decision, (192 Federal Second 920), the Court of Appeals for the Ninth Circuit cited with approval the decision of *Cramer vs. France* from which I have read, 148 Federal Second 801.

And furthermore, may it please your Honor, un-

(Testimony of Joseph Bonzani.)

der the decision of the Supreme Court of the United States the determination of whether there has been an arbitrary action is predicated upon the file itself and everything else becomes [62] extraneous. If, as your Honor suggested in previous rulings, there is any basis in fact for the clarification, then the issue ends.

And here is what *Cox vs. United States* (68 S. C. 120) says:

“Perhaps a court or jury would reach a different result from the evidence but as the determination is for selective service, its order is reviewable ‘only if there is no basis in fact for the classification.’ ”

Citing *Estep vs. United States*:

“Consequently when the court finds a basis in the file for the board’s action, that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders. Upon the judge’s determination that the file supports the board, nothing in the file is pertinent to any issue proper for jury consideration.” [63]

It was the intent of Congress, if your Honor please, that draft boards would not be placed on trial for any supposed motive or any supposed prejudice if the file contains the basis in fact. And here we do have a basis in fact, because this man did not join Jehovah’s Witnesses not after 1948 alone, the date of registration, but in September, 1950, he became immersed and so to speak a minister, after the Korean incident occurred and they

(Testimony of Joseph Bonzani.)

began drafting young men under the act. So therefore any questions directed to this witness would be immaterial on two grounds, first, the basis in fact; second, that the action of the local board has been supplanted by the decision of the board of appeal and if it were to have any pertinent application it would have to have been on the board of appeals, and we would have objected on the ground that the issue must be determined from the file itself under the latest decision of the Supreme Court of the United States affirming the decision of the Ninth Circuit.

The Court: Which case is it that says you can show bias or prejudice? The Estap case?

Mr. Karesh: The Estap case doesn't say anything about it.

The Court: There is a later one?

Mr. Karesh: He is thinking about some decision in some other circuit which speaks about bias or prejudice which runs, in my opinion, purely contrary and into the teeth of the decision of Cox vs. United States. It says if there is any basis [64] in fact, no matter what the members think, if the members can support their decision that is all, if there is any basis in fact in the file. We object to the line of testimony.

The Court: I will allow that question.

Mr. Brill: You may answer that question.

The Court: Would you read the question?

(Reporter read the question.)

(Testimony of Joseph Bonzani.)

The Court: Do you remember whether there was or not yourself?

A. Whether he made the request I do not remember, but the board——

The Court: All right; next question. Just answer if you remember. Don't try to stretch your memory if you don't remember it.

Mr. Brill: The board considered it as being a request for a deferment as a student minister; is that correct?

A. That is correct.

Q. In their examination of him at that time of the hearing they examined him in the light of what they thought was a request for a deferment as a student minister; is that correct?

Mr. Karesh: Objected to, your Honor, as the best evidence is the stenographic report which is in evidence. It will speak for itself.

The Court: That calls for the conclusion of the witness. You are trying to ask the question what was in the minds of the [65] other Draft Board members.

Mr. Brill: I am sorry; I will withdraw that. I will ask him what was in his mind at the time of the interrogation.

Mr. Karesh: Objected to as calling for the conclusion of the witness, and furthermore the best evidence of what occurred is that stenographic report.

The Court: Unless the stenographic report is incorrect. If you want to interrogate on those lines,

(Testimony of Joseph Bonzani.)

if you want to go into the life of this witness, it is hardly material. You might ask him what he said, what he did.

Mr. Brill: I had hoped it wouldn't be necessary for me to divulge our position in the presence of the witness which will tend to allow him to clear up the matter which I am about to ask.

The Court: I will allow the question. I don't want to put you in the position of having to divulge this information.

Mr. Brill: I might say this, however, your Honor: Our position is this——

The Court: I know what your position is, and I don't want the witness to have the——

Mr. Brill: All right.

The Court: Answer the question. I think the best way to get around it is to let him answer.

Mr. Brill: Very well.

The Witness: Let me have the question. [66]

The Court: He wants to know what was in your mind at the time of the interrogation. What kind of an answer have you to make to that? Maybe he was thinking of a fishing trip.

Mr. Brill: With reference to the claim of exemption; I am sorry. With reference to the claim for exemption made by Mr. Schuman, did you understand he was claiming exemption as a student minister?

Mr. Karesh: Objected to as incompetent, irrelevant and immaterial, if your Honor please. The action of the Local Board was supplanted by the

(Testimony of Joseph Bonzani.)

action of the Appeal Board. He could have misunderstood everything; he could have thought he was applying for a student minister or minister as distinguished from student preparing for the ministry; it is incompetent, irrelevant and immaterial for the reason, if your Honor please, that the summary which the board made of the stenographic record was submitted to the registrant, he went over it, and, according to the record, corrected what he said was a mistake and submitted it to the Board of Appeal. The Board of Appeal acted and unanimately decided adversely to the registrant. Anything he did is immaterial.

The Court: I can't see how it could possibly have any bearing on it.

Mr. Brill: If the Court please, the law requires due process in the processing of these registrants. I think that is clear from all of the cases. If the registrant made an [67] application for exemption as a minister and the board only considered his application for exemption as a student minister, different rules apply for determining the question of whether he is a minister or a student minister. Our position is this: that he has been denied due process of law since they never considered the question of whether or not he should have exemption as a minister.

According to their own minutes, which were written pursuant to the regulations, as I will point out, the minutes were required by the regulations to be prepared and a summary was required to be pre-

(Testimony of Joseph Bonzani.)

pared so that the summary could be sent to the Appeal Board. That is the basis upon which the Appeal Board determines the validity of the action of the local board.

Mr. Karesh: May I interrupt you there?

Mr. Brill: May I continue, please, Mr. Karesh?

Mr. Karesh: That never went to the Board of Appeal and it is incompetent, irrelevant and immaterial. That is the board's own minutes.

Mr. Brill: May I finish my argument?

Mr. Karesh: You may if you will——

The Court: Allow Mr. Brill to finish.

Mr. Brill: This was produced from the file that was brought here to court and it was stipulated to, which was part of the record that went up under the cover sheet to the Appeal Board. [68]

Mr. Karesh: That is not correct.

The Court: Mr. Karesh, I have to ask you again—if you haven't a pencil, the clerk will supply you with one, and you can make notes, and when Mr. Brill has finished you will have a full opportunity——

Mr. Karesh: When he challenges the stipulation——

The Court: You will have opportunity to answer. From many years' experience I have learned to accept with caution all statements of counsel on both sides.

Mr. Karesh: Thank you, Judge.

The Court: If you will take pencil and paper and write that down——

(Testimony of Joseph Bonzani.)

Mr. Karesh: I have done it.

The Court: Take all the time you want to explain your point.

Mr. Brill: Thank you. As I stated, there are different rules to be applied by the board in determining whether or not exception is based on a student minister, regular minister, or ordained minister. I am quite sure your Honor is familiar with the regulations, and I will burden your Honor again with them at the time the matter closes to point out our points. But at this time I wish to point out that, according to the record itself, the record indicates that the denial of his claim for exemption as a student minister was the question in the minds of the Hearing Officer or the Draft Board at the time of this [69] determination as indicated by their own records which cannot be impugned at this time. My inquiry here is to further bring out from this witness as to the question of where the inquiry should go to determine whether or not he is entitled to exemption as a student minister.

I will further point out from the record from the questions themselves that they had in mind that he was requesting exemption as a student minister, because they repeatedly in the transcript and in this record harp or question him on the question "Did you attend a regular Divinity School?" I am reading now from this excerpt itself: "Trained in theocratic school in San Francisco. No formal examination for ordination." Elsewhere it states in

(Testimony of Joseph Bonzani.)

here: "Has not attended divinity school recognized by Selective Service."

All through the inquiry made, it indicates that the inquiry was on an erroneous basis. He had claimed exemption as a regular minister. The inquiry was one directed to the question of whether he was exempt as a student minister. Now it is true that he did not attend a divinity school which was a recognized divinity school, and on that basis their determination that he was not entitled to deferment as a student minister was perhaps correct, because the law states that you must be in attendance at a regular recognized divinity school.

Now he has never, I say according to the record, had a determination of whether he was entitled to exemption as a [70] minister. The record speaks for itself. And that is the inquiry I wish to develop at this time.

The Court: Do you remember whether it was discussed either way?

A. The whole three questions were discussed.

Mr. Brill: Well, I should like to develop, if I may. That is the purpose for this inquiry.

Mr. Karesh: Now, if your Honor please——

The Court: Now wait a minute. Had you finished, Mr. Brill?

Mr. Brill: Yes, I had.

The Court: Do you want to be heard?

Mr. Karesh: Yes, your Honor. I say this never went before the Appeal Board, and it is immaterial. The record that went to the Board of Appeal was

(Testimony of Joseph Bonzani.)

that—what exhibit, may I ask, is the transcript of testimony of October 8? I will read the section. I have the photostat.

The Court: You can read from that.

Mr. Karesh: “Primary vocation is student. Continued in 1-A. Request denied for classification as ordained minister and conscientious objector.”

That is what they considered.

Furthermore, may it please your Honor, the record, transmittal record sheet, which came back with the Board of Appeals decision—you will notice that this one—it is SSS Form 120, [71] I don’t know the exhibit, it says: “Individual appeal record, date classified 1-A, September 11, 1951; forwarded on appeal taken by registrant, requests 4-D classification, minister, Jehovah’s Witnesses.”

The Court: Next question. He has answered the last question. Now you go on.

Q. (By Mr. Brill): Mr. Bonzani, do you know or are you familiar with what the regulations provide in determining whether or not a man is a regular minister?

Mr. Karesh: Objected to, your Honor, as incompetent, irrelevant and immaterial; the local board is not on trial; and furthermore, it is the Appeal Board action, not the local board. He does have to say whether he knows or he doesn’t. He is presumed to know.

Mr. Brill: We submit that we have a right to inquire as to whether or not board members for themselves understood the law applicable in these

(Testimony of Joseph Bonzani.)

cases. Obviously if they did not understand that there was a difference, or misinterpreted it, then the man did not have a fair hearing before them, because it is quite possible that their conclusion may have been otherwise.

Mr. Karesh: Draft Board members who serve without compensation do not have to submit themselves to this line of inquiry we have been making. Furthermore it is the Appeal Board, not the Local Board. That action has been wiped out by the Appeal Board. It is a record de novo, and our Supreme Court has so [72] held, in anything that this witness would testify to about his mental postures, what he knew about regulations, is incompetent, irrelevant and immaterial.

Mr. Brill: We submit that under the decided cases it is very competent, because——

The Court: You have got all the regulations in the office or copies of them?

A. Yes.

Q. The members of the board and the clerk discussed the various regulations at various times; is that right?

A. Yes.

Q. You read them from time to time?

A. If there is something we do not understand, we refer to the book.

The Court: You don't remember what the book says—if you want to know what is in the book, you want to see the book, I presume.

A. Right.

The Court: He is a pretty intelligent man, the

(Testimony of Joseph Bonzani.)

manager of a bank, and as men go has his viewpoint the same as all of us have different viewpoints. I guess he can read regulations and follow them as a layman does. And of course Draft Board members are laymen. That is why we have Appeal Boards; that is why we have Department of Justice investigations; that is why we have United [73] States courts.

Mr. Brill: We should like at this time, with all due respect to your Honor, to assign the remarks of your Honor and the questions as prejudicial to the defendant, and ask that the questions and remarks be stricken from the record.

The Court: Let's see which question? The last question that you asked?

Mr. Brill: The leading questions that were asked of the witness.

The Court: Well, they were leading, and I think the Court has power to assist in order to arrive at the facts. Any question in your mind as to the questions I asked?

A. No.

Q. They were clear to you? A. Yes.

The Court: I think I will let them stand. If I struck them from the record—there is no jury present; they won't have any effect. If they were detrimental, the detriment is suffered; if I strike them I won't remedy it. I don't think there is any detriment, but if there is there is nothing much can be

(Testimony of Joseph Bonzani.)

done to change it. So go ahead. However, you have your exceptions.

Mr. Brill: Certainly. Do I understand that your Honor will now allow my questions with reference to what this member of the Draft Board, the present witness, knows about the distinction between regular ministers and ordained ministers? [74]

The Court: I don't think it is material at this point. The man is not qualified as an expert.

Mr. Brill: No, but—

The Court: Any more than the Judge can very well be called on to go into a long discussion as to how he arrived at his viewpoint.

Mr. Brill: Yes, but there are many cases, your Honor, that hold that the defendant has a right to show that when his case was considered an erroneous interpretation of the law was made; that if—

The Court: I will allow you to introduce any evidence you want of bias, prejudice, motives—anything of that nature—or that the ordinary processes were not gone through; that is to say, that he did not receive notice, or that a meeting was not held. Sometimes boards certify that they held meetings. It has been known sometimes on very rare occasions that a board has certified it held a meeting when it hasn't held one, something to that effect, which goes to due process. That isn't due process that you are talking about. You are talking about the fact that you desire an opinion on a legal question.

Mr. Brill: No, my interpretation of due process

(Testimony of Joseph Bonzani.)

is not only the right to be heard, but the right to be heard by a Judge who——

The Court: Knows the law? [75]

Mr. Brill: ——who, after hearing you, applies the correct law to you. And I think there are many cases I can cite to your Honor on this same question where the draft boards were held to have misinterpreted the law or applied the erroneous law, and therefore due process has not been followed. This is not a judicial proceeding. It is a proceeding at which they cannot bring an attorney. The record itself speaks for itself. They wouldn't allow him to bring an attorney. He attempted to get the shorthand reporter before the board; that is true, Mr. Bonzani, isn't it?

A. Yes.

Mr. Brill: He brought that shorthand reporter with him.

The Court: But you have that fact in the evidence now. Your remedy is with the legislative authority and the executive department which make these regulations. We cannot quarrel with them at this late stage. Maybe the act is faulty; that is the fault of the legislative branch. Maybe the regulations are faulty; that would be the fault of the executive branch. We can't do anything about that.

Mr. Brill: Maybe the enforcement is faulty. And the only recourse we have is to make a showing of that kind at a trial.

The Court: No. I am going to limit you to these things:

(Testimony of Joseph Bonzani.)

First, due process in the sense that all the requirements of law were complied with as far as notice of meetings were concerned; [76]

Second, I will allow you to go a little further than that, and some cases do not allow that. I will allow you to show any motive or prejudice or bias. But as far as discussion of how they arrived at their decision, the record is the best evidence. If the record doesn't sustain their decision, if there was no basis in fact for their decision, it could not stand.

Mr. Brill: That is right.

The Court: And the record is the only determinant of that, not what was going through his mind, and whether the record itself sustains it. So if you will limit yourself to that field, I think that will be proper. Further than that, as to his processes of thought and as to his exact knowledge of draft regulations, I don't think that that is a proper inquiry at this time.

Mr. Brill: We make an offer of proof at this time which we intended to produce in evidence; that this witness did not understand the different test that is applied to a person claiming an exemption as a student minister or as a regular minister or as an ordained minister, which is indicated by the questions and answers received at that hearing.

The Court: Well, I would say that that is already in evidence, as to the questions and answers at that hearing.

Mr. Brill: Well, I should say that he did not

(Testimony of Joseph Bonzani.)

know the difference that there was. Now if your Honor is limiting me [77] in the right to inquire as to what he knew about the regulations, we will submit to that; and after we have made our offer of proof—

The Court: Well, suppose instead of making a general ruling, which is always bad, suppose you ask the questions and I will pass on them one at a time. I am not limiting you; I am withdrawing the limitation. You can ask the questions. Perhaps a question or two would be proper.

Q. (By Mr. Brill): You were present at the hearing and were present when questions were asked of the registrant; isn't that correct? I am referring to the hearing had on October 8, 1951.

A. Yes, sir.

Q. That was in the evening? A. Yes, sir.

Q. Who else was present?

A. You mean the draft board members?

Q. Who else was present in the room?

A. There were two other members of the draft board, Mr. Dooley and Mr. Soldivani; the clerk of the board—

Q. Who else?

A. The clerk of the board, Johnnie Ellington, and Miss Eubanks.

Q. You are certain that all three members of the board were there that evening?

A. Yes, sir. [78]

Mr. Karesh: If you will permit me, I ask that he refresh his recollection by the minutes.

(Testimony of Joseph Bonzani.)

The Court: He is entitled to look at the minutes.

Mr. Brill: He has them right there.

The Court: Is that a summary?

A. That is a summary.

Q. Does that summary show they were all there?

A. I remember them.

The Court: He says he remembers them.

Mr. Karesh: May I see those? Would you look and refresh your memory from the minutes?

A. The minutes show two members, but the three members were there.

Mr. Brill: The minutes show two members, but actually three members were there; is that correct?

A. Yes.

Q. Did all three of you ask questions?

Mr. Karesh: May I ask that the witness be shown that document? He is being queried about what happened, and the best evidence is the stenographic record.

Mr. Brill: No, this isn't a question of establishing it under the best evidence rule.

The Court: Mr. Bonzani, if you can remember without being shown the record, you will so state. You are not required by law to remember something that you do not remember. If you do [79] remember it, you may state it, but that is as far as you are supposed to go. We have a transcript. We have what is asserted to be a transcript of the proceedings.

Mr. Brill: It is alleged to be.

(Testimony of Joseph Bonzani.)

The Court: That is what I say; it is alleged to be. What was your last question?

(The reporter read the last question.)

Mr. Karesh: I would suggest that he be shown the stenographic transcript and let him look through it.

Mr. Brill: I think we are entitled to an answer.

Mr. Karesh: He is your witness. Are you attempting to impeach your own witness? I would ask that he be shown the record.

The Court: That is the first time I have heard a proper objection. If you will make a proper objection I will rule. This is his own witness. He cannot impeach him.

Mr. Karesh: That is right.

The Court: If you will make the proper objection——

Mr. Karesh: I make that objection.

The Court: This is not an adverse witness.

Mr. Brill: I believe that he would be, because he is an employee, although not paid by the Government——

The Court: Well, we all are. I am an employee of the Government. I assure you that it doesn't affect me in my rulings. [80]

Mr. Brill: No, but upon this trial we have a right to treat him as an agent of the Government, the United States Government, who is the plaintiff in this case, and he would certainly be an adverse witness, your Honor.

(Testimony of Joseph Bonzani.)

The Court: Did you call him as an adverse witness?

Mr. Brill: I don't believe under the law we are required to call him, under 2055 of the California Code.

The Court: 43 (b).

Mr. Brill: 43 (b).

The Court: Go in and get my code of criminal procedure. It is in the side of my desk. It is a paper-bound volume. Go ahead, anyway.

Let us take our questions one at a time so we can get somewhere.

Mr. Brill: All right.

Q. I think the question was, did all of you ask questions or just one of you?

A. Well, I can't remember everybody asking questions that night.

Q. You don't remember? A. No.

Q. Let me ask you this: Isn't it quite unusual to have a transcript of the questions and answers?

The Court: Sustained.

Q. (By Mr. Brill): Why in the record does there appear a transcript of questions and [81] answers?

The Court: That objection is sustained, too. Next question.

Q. (By Mr. Brill): Did you ask him the question of whether or not he would salute the flag?

A. Did I personally?

Q. Yes. A. That I do not remember.

(Testimony of Joseph Bonzani.)

Q. Was that question asked?

The Court: Whether somebody else asked him?

Mr. Brill: Yes, was that question asked?

A. I do not remember.

Q. I would ask you to refresh your recollection from this transcript and also from the minutes.

Mr. Karesh: May it please your Honor, I object to this line of inquiry. He asked the witness whether or not a certain statement was made, and the witness says he doesn't remember. Then he furnishes him with a stenographic report that is in evidence. What is the pertinency of this?

The Court: You were the one that suggested that he be given that record.

Mr. Karesh: That is right, Judge.

The Court: All right, let him see it. If it helps him any, all right.

A. Yes, the question was asked.

Q. (By Mr. Brill): Now why was that question asked?

Mr. Karesh: Wait a minute; don't answer the question. [82]

Q. (By the Court): Who asked him?

A. Mr. Dooley.

The Court: Mr. Dooley asked it.

Q. (By Mr. Brill): Why was that question asked, if you know?

Mr. Karesh: Objected to as calling for an opinion and conclusion.

Mr. Brill: This is a board that meets as a body—

(Testimony of Joseph Bonzani.)

Mr. Karesh: We have Mr. Dooley here.

Mr. Brill: We can bring him here.

The Court: You may ask Mr. Dooley.

Q. (By Mr. Brill): Did you exclaim, upon that being asked and the answer being no, "What? You don't salute the flag?" Did you say that?

A. I personally?

Q. Yes. A. I don't remember saying that.

Mr. Brill: You don't remember saying that?
We have no further questions.

The Court: Any questions?

Mr. Karesh: No.

The Court: This witness may be excused?

Mr. Brill: Yes, your Honor.

The Court: All right; you may go back to the bank.

The Witness: Thank you.

The Court: Next witness. [83]

Mr. Brill: We will ask Mr. Dooley to take the stand.

MATTHEW J. DOOLEY

called as a witness on behalf of the defendant,
sworn:

The Clerk: Will you please state your name?

A. Matthew J. Dooley, 1508 Hobart Building.

Direct Examination

By Mr. Brill:

Q. Mr. Dooley, you are an attorney and you are also a member of Local Board 38; is that correct?

(Testimony of Matthew J. Dooley.)

A. I am.

Q. And you were present at a meeting at which the defendant made a personal appearance before the draft board members on October 8, 1951; is that correct?

A. I have no independent recollection; we have had perhaps thirty or forty or fifty meetings since then, and obviously I didn't make a special note of this. Our meetings go on every month, or every week. We have some seven or eight thousand registrants. The last meeting we had a month, or two weeks ago, three weeks ago, I think we had about forty—thirty-five or forty registrants in there. It is very difficult, to say the least, for me to say that I have an independent recollection of this particular situation. I don't have.

Q. You have my undying respect for the amount of effort and time you are putting in on this work.

A. Thank you. [84]

Q. Mr. Dooley, since you have no independent recollection, can you tell us whether or not it is customary for the board to make a transcript of the questions and answers given at these hearings?

A. We have done that in a great many instances, yes.

Q. Do you remember this instance by reason of the fact that Mr. Schuman appeared with a former official court reporter and requested the right to have the reporter merely take in shorthand what was said by each of you?

(Testimony of Matthew J. Dooley.)

A. I think so, because it was the first time such request was made of the board.

Q. And do you remember also refusing to allow the reporter to take notes of the hearing?

A. Yes, I think we made that very clear that the regulations did not permit that.

Q. This is a rather lengthy transcript here, and I will show you from Government's Exhibit Number 18, page 9, down near the bottom, you asked the question——

Mr. Karesh: May I interrupt a minute to ask your Honor whether counsel is proceeding under the impression that this man is being called as an adverse witness, because there aren't any such in criminal cases.

The Court: He hasn't made the assertion; there is nothing for me to rule on. Go ahead. You call his attention to what? Do you get the place where he called your attention to? [85]

A. Yes, I have, your Honor.

The Court: All right.

The Witness: Does he wish me to read it?

Mr. Brill: Yes.

A. What line. I see "Mr. Dooley" at various places. Would you indicate the particular sentence, the particular question?

Mr. Brill: Did you ask the question: "Would you salute our flag?"

A. Oh, that is the one you refer to?

Q. Yes.

(Testimony of Matthew J. Dooley.)

A. Presumably, yes. I have no independent recollection of that.

Q. Well isn't that part of the record of Board 38?

A. If this be part of the record, I would say yes; but I don't know whether it is part of the record so far as my independent recollection is concerned. If it was introduced in evidence, I think it is.

The Court: The question is, now that you see the paper do you remember whether you said that or don't you remember?

A. Frankly, your Honor, I have no recollection of the situation at all.

Q. (By Mr. Brill): That would have no relevancy as to the question of whether or not he was a conscientious objector or a minister, would it, Mr. Dooley?

Mr. Karesh: Objected to, your Honor. [86]

The Court: I want an answer to that; I want to know whether he was biased or prejudiced.

A. None whatever. We certainly were fair with the boy; we gave him an hour's time which was more than the usual time we gave to registrants.

Q. (By Mr. Brill): I understand that. The question was: that was not relevant to the question of determining whether or not he was a minister or conscientious objector, was it?

A. You mean——

Q. The question of whether he would salute the flag?

(Testimony of Matthew J. Dooley.)

A. It was not relevant to what, you say? Pardon me; I didn't get the question.

The Court: Was there any connection between one and the other? Is that what you mean?

Mr. Brill: That is correct.

The Court: It is a little difficult to understand some of these things, some of these words.

Mr. Brill: I'm sorry, your Honor.

Q. (By Mr. Brill): Was the question of whether he would salute the flag material to a determination of whether he was a minister or a conscientious objector?

A. I have no recollection of that. If you want to know my present opinion, I will give it to you.

Q. But you have no recollection of your opinion at that time?

A. I assume it would be the same as it is now. I don't think [87] it would be particularly material.

Q. You had information that a number of registrants were claiming deferment because of conscientious objection, had you not?

A. You mean me personally?

Q. Well, in the Board. A. You said me.

Q. Well, you, along with the Board; isn't that correct?

A. You mean the Board sitting as a Board?

Q. Yes.

A. Yes, I think we have had a number in our Board in the numbers interviewed, like any other registrant.

(Testimony of Matthew J. Dooley.)

Q. And a number of these were members of a sect known as Jehovah's Witnesses; isn't that correct?

A. I don't remember about the number. Frankly I don't know whether it would be one, two, or more members of our Board who are members of Jehovah's Witnesses. I have no independent recollection, frankly.

The Court: You mean registrants?

The Witness: Registrants, yes.

Q. (By Mr. Brill): So that you have no recollection of whether or not you had before you a member of Jehovah's Witnesses prior to October 8, 1951?

A. No, I have no recollection of that. We would not have, because they come before us, we try to give them a square deal [88] in our lights, and if a man is a Catholic or a Protestant or something else, that isn't particularly important to us, frankly.

Q. Is there anything in that transcript or anything, let us say, on that one page that has anything to do with saluting the flag other than the question you just read to us and the answer given?

A. That requires me to read the entire page.

The Court: You tell us whether there is not, Mr. Brill.

Mr. Brill: There isn't anything.

The Court: All right, there is nothing else on the page. There is no use of taking up our time——

Q. (By Mr. Brill): What prompted you to ask

(Testimony of Matthew J. Dooley.)

the question out of the blue “Would you salute the flag?”

Mr. Karesh: Objected to; he is impeaching his own witness; he is arguing with his own witness.

The Court: I will allow this question: what prompted you to ask—do you remember what prompted you to ask?

A. At that time I do not, your Honor. I can't go back a year and determine what was in one isolated case, what prompted us to ask a certain question. That would be superhuman. I would have a superhuman memory to answer you truthfully. Frankly, I have no recollection.

Q. (By Mr. Brill): As a matter of fact, you are personally prejudiced against Jehovah's Witnesses, aren't you? [89] A. Absolutely not.

Mr. Brill: No further questions.

Mr. Karesh: No questions.

The Court: You have no bias or prejudice against Jehovah's Witnesses, have you?

A. None whatever, your Honor.

Q. And you try your best, no matter what religion they belong to, Jehovah's Witnesses or any other—

A. Certainly, we try to judge rightly on the facts.

Q. How long have you been on the board?

A. I served on the board since 1938 through the war, and then the new board—

The Court: 1940?

(Testimony of Matthew J. Dooley.)

A. '40 to '45. And then the new board was created and I was reappointed. I have a background of experience on it.

The Court: Any questions?

Mr. Karesh: No questions.

The Court: Next witness.

Mr. Brill: If the Court please, we will rest at this time.

The Court: Do you desire to present any argument?

Mr. Brill: I would like to make a motion at this time.

The Court: That is right.

Mr. Brill: At this time defendant makes a motion for judgment of acquittal. At the close of all the evidence the defendant moves the Court to render and enter a judgment of [90] acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure for the following reasons:

1. The evidence is insufficient to sustain a conviction for a violation of the Selective Service Act of 1948 as Amended.

2. The undisputed evidence shows that the 1(a) classification is arbitrary, capricious, and without basis in fact.

3. The draft boards acted arbitrarily, capriciously, and without any basis in fact, and in the teeth of the undisputed evidence showing that the defendant was a minister of religion engaged in teaching the principles of a recognized religious organization as his vocation when the board finally

put the defendant in Class 1(a) and ordered the defendant to report for induction, and refused to place the defendant in Class 4(d).

4. That the Local Board acted arbitrarily, capriciously, and without any basis in fact and in violation of due process of law in that the evidence shows they refused to follow the definition and standard set up by the Selective Service Act, Section 16, Title 1 as Amended, for determination of who is a minister of religion, which section provides as follows:

“The term ‘regular minister of religion’ means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect or organization, of which he is a member, without having been formally ordained as a minister of religion and who is [91] recognized by such church, sect, or organization as a regular minister.”

The evidence discloses that the draft board, at the hearing, attempted to determine the question of deferment as a minister upon the sole basis of whether or not the registrant attended a “recognized divinity school or college.” At this point we think, in fairness, that the Court should read the transcript of testimony given before the local board.

The Court: I have read it.

Mr. Brill: You have. It will be seen there that the only attempt was to determine the schooling that this defendant had received. The regulations have no bearing upon what schooling a man may have received. The regulations and the interpretation by General Hershey of the Act itself indicate

that one who received no schooling may be a minister dependent upon the work, the actual fact, rather than what schooling or basis the claim was upon.

5. The draft board acted arbitrarily, capriciously, and without basis in fact and in the teeth of the undisputed evidence showing that the defendant was conscientiously opposed to participation in war in any form, by reason of religious training and belief, when the board finally put the defendant in Class 1(a) and ordered the defendant to report for induction and refused to place the defendant in Class 1-O.

6. That the local board denied defendant due process of [92] law, contrary to the Fifth Amendment of the Constitution of the United States, and Sections 1622.1, subdivisions (c) and (d) and 1622.43, subdivision 2, and 1622.14, subdivision (a) of the Selective Service Regulations, in that the personal hearing accorded the defendant, as indicated by the minutes of the personal appearance before the local board meeting held October 8, 1951, shows that the board considered the request for deferment made by defendant as one being made by a student minister rather than as a minister; that in view of the indication in the minutes, the defendant has in fact had no hearing before the local board as required the provisions of section 1624.2, subdivision (b) of the Selective Service Act on the question for deferment as a minister but only as a student minister.

7. That the Appeal Board denied the defendant due process of law, contrary to the Fifth Amend-

ment of the Constitution of the United States, in that the Appeal Board acted upon the recommendation of the Department of Justice pursuant to the provisions of the Selective Service Act and that the Department of Justice in its letter of recommendation dated July 24, 1952, has misquoted and misinterpreted the provisions of the Selective Service regulations to be used in determining the question of the right to classification as a conscientious objector in that they have stated the law to be that the registrant must establish, and I quote, "that such alleged objections are based [93] upon deep seated conscientious convictions arising out of religious training and belief," whereas the provisions of Section 1622.14, subdivision (a) of the Regulations of the Selective Service Act provide as follows:

"In Class 1-O shall be placed every registrant who [93-A] would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and non-combatant training and service in the armed forces."

and Section 6(j) of Title 1 of the Act provides as follows:

"Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

At this time I think I would like to call the Court's attention to that letter dated July 24, 1952,

from Plaintiff's Exhibit 28, I think it is. I should like to read this letter itself, which brings home the point we are making. It is addressed to the chairman of the Appeal Board and is written by J. Oscar Smith, Special Assistant to the Attorney General.

"After examination and review of the entire file and record, the Department of Justice finds that the conscientious objections of the above-named registrant are not sustained on the ground that he has failed to establish that such alleged objections are based upon deep-seated conscientious convictions arising out of religious training and belief." [94] As I have pointed out, your Honor, the Regulations themselves make no such norm or standard of decision. If at the time he appears for final classification there is a showing that his religious beliefs are such and he conscientiously at that time opposes war service, that is the determining factor.

Then Number 8 of our objection or ground Number 8 for our motion: The undisputed evidence shows that the Department of Justice Hearing Officer, allegedly acting pursuant to the provisions of the Selective Service Act, failed to grant defendant a full and fair hearing, contrary to the Act, the Regulations and the Fifth Amendment to the Constitution of the United States. That a portion of the order and recommendation made by him was in excess of his jurisdiction and beyond the scope of his authority, as set forth in Section 1625.25, Subdivision 3(c) of the Selective Service Regulations which provide as follows:

"The Department of Justice shall thereupon make

an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant.”

Mr. Karesh: “With respect to.”

Mr. Brill: With respect?

Mr. Karesh: You said “On the character”; it says “With respect to.”

Mr. Brill: Well, I am sorry—“with respect to the character and good faith of the conscientious objections of [95] the registrant. It attempts to limit the scope of the inquiry to be made by the Hearing Officer to two things: character and good faith.

Now let’s see what the Hearing Officer found as to those two things—and I will ask for Exhibit 27, I believe it is. After reviewing the statement of facts this is the conclusion the Hearing Officer came to after hearing this matter and seeing the FBI report.

“Conclusion. The Hearing Officer wishes to emphasize that the registrant became actively identified with the Jehovah’s Witnesses in 1949, and although, apparently, sincere in his religious beliefs, he has not been identified with the faith a sufficient length of time to convince the undersigned that he is entitled to exemption from military duty.”

In other words, our position is this, and I think it is borne out by the conclusion of the Hearing Officer: that he found his character to be good; the facts indicate it, the FBI report indicates it, that his character was good and he was sincere in his conscientious belief as required by the Act. However, the thing that was added to this was the fact that he

had not been a Jehovah's Witness for more than three years. But there is no power given the Hearing Officer to make such a finding under the express inhibition set forth in the Regulations themselves, and to exceed that would be to exceed the [96] jurisdictional power expressly given him by the Act.

The Court: Where did you see that "three years"? I didn't see that anywhere, and I didn't hear anything about three years in any of these proceedings.

Mr. Brill: Oh, no.

The Court: You are just drawing the conclusion.

Mr. Brill: No, I am going by the facts.

The Court: I don't see anywhere that anybody said anything about three years.

Mr. Brill: This hearing was had in 1952.

The Court: He became a Jehovah's Witness at the end of 1949 is my best recollection.

Mr. Brill: That is correct.

The Court: In September, 1950, he was ordained a minister?

Mr. Brill: That is correct.

The Court: That is the way I recollect it. I don't remember the three years being mentioned at all.

Mr. Brill: It isn't quite three years; it is about two and a half years.

The Court: That is merely a conclusion you were drawing from the fact that they thought it wasn't long enough?

Mr. Brill: That is right; but it was a period of two and a half years, according to the records.

If your Honor wishes a case on the question of the time when the determination should be made, a case on that is [97] United States vs. Stalter, 151 Fed. (2) 633, which was a case in which several months before the hearing the status of the registrant was different but at the hearing his status had changed to that of a minister although he had only been a minister for several months. The Court held that the proper time to determine his status is as of the time of final classification, very ably pointing out that in the course of life a young man his status may change very fast; he may change from a student to a physician, which would put him in a different category; he may be elected to the bench and become exempt by reason of being a Judge; many things may occur, and therefore the only clear, logical interpretation of the Act would be that the time of his final classification shall be taken as the determining factor and it is his situation at that time that shall govern, and the mere fact that he had been a conscientious objector or a minister for six months, two years, eighteen months, should have no bearing upon the finding as ultimately made. The Justice Department Hearing Officer made the finding that he was conscientious and in good faith, which was all that was necessary, and upon that finding he should have been classified at that time under a 1-O classification.

9. That the registrant has been denied due process of law by the consideration and reliance by the

Hearing Officer upon the statements of informers or informants appearing in the [98] FBI report, which were not made known to the defendant and the consideration and reliance upon the report by the Hearing Officer, making reference to such statements, constitutes a violation of the procedural rights guaranteed to the defendant which is contrary to the Fifth Amendment and to the Sixth Amendment because the Constitution, guaranteeing a defendant in a criminal case trial the right to confrontation of witnesses, because the defendant has at no time had the right to answer the statements made to the FBI agents which appear in the report or cross-examine the persons making the statements or the FBI agent who took the testimony which has been relied upon to deny the defendant his rights to a conscientious objector classification under the Selective Service Acts and Regulations.

10. The action of the Court in construing the Act and Regulations so as not to require the Government to produce the FBI report and include it in the record in this case and the action of the Selective Service System in not including the FBI report in the file of the registrant in this case, constitutes a denial of due process guaranteed by the Fifth Amendment to the United States Constitution and a denial of the right to confrontation guaranteed by the Sixth Amendment to the Constitution.

11. If this motion for judgment of acquittal is not sustained and the defendant is found guilty upon the record in [99] this case, his rights to confrontation of witnesses against him will be denied,

thus making the Selective Service Act Regulations conflict with the Fifth and Sixth Amendments of the United States Constitution.

We would ask the Court, in view of the record and the law as we have very humbly attempted to point it out, to take into consideration this fact: his original registration was at a time when he was still in high school. His mother had been a Jehovah's Witness since 1945. He came from a broken home. Religion was not an important matter to him until he became mature enough to give it some thought.

As is indicated, he had numerous discussions with his mother—the record speaks for itself—about the Jehovah's Witnesses. He was torn, perhaps, between his early upbringing and Jehovah's Witnesses. There came a time when he became old enough so that it became an important matter to him. As he indicates in the record, he met a girl of a different faith, the Catholic faith. This perhaps brought to his attention the question of the proper religious theme for him at that time.

I am sure your Honor will take judicial knowledge of the fact that a youngster in high school doesn't give religion much thought. The question of conscientious opposition to war and other religious facts certainly do not bear heavily upon a youngster's mind. So that, therefore, the fact is that [100] in 1948 when he first registered while he was still going to high school, and in 1949, I think it was June, when he first filled out the original questionnaire, he told the truth: he was not a minister,

he had no religious scruples against engaging in war. But there came a time—at that time he was 19 years old—when he had to give it some mature thought; his life was then opening up; he was thinking of getting married, going with a girl of a different faith and then he made searching inquiry in his very young mind—and I think I am old enough now to call a boy 19 young—and then for the first time rose this question.

Now can we, in the face of the fact that his mother had been a Jehovah's Witness prior to that time and the fact that he had not matured to a point sufficient to make up his mind on a proposition, take that as the sole basis for denying him his rightful classification under the Regulations as they exist?

I think your Honor perhaps knows that I do not subscribe to that faith, but I am here as a lawyer, and I think the laws should be upheld by all of us, whether we agree with them or not. As your Honor knows——

The Court: Mr. Brill, you never have to apologize in this court or in any other court for appearing for any defendant charged with any offense. Never do that.

Mr. Brill: No, but I do want to convince your Honor of [101] my sincerity in pleading this matter and in analyzing that.

Each of the investigative bodies who investigated this boy came to the conclusion that he was sincere; that he was in good faith; that this was not done to avoid some military service. I think the

facts are patent that he knew and will submit to the humiliation and possible conviction and incarceration in a Federal prison rather than give up his faith as he has found fit to believe it or to compromise with it. I think your Honor has perhaps been familiar enough with human behavior to realize that a boy can get into the service and goldbrick and get a safe job and do all sorts of things or get himself kicked out with malice of forethought which they form to avoid military service.

We have here a boy who is convinced that his religion is right. His religion teaches him he is not to engage in the war effort in any way or contribute to it. The statement in one of the records indicates that he will serve for the national welfare provided it isn't part of the war effort.

I would sincerely urge your Honor that, in view of the record, there isn't basis in fact for the ultimate finding made by the Draft Board and to find the defendant not guilty. Thank you.

(Argument and discussion between court and counsel.)

The Court: This matter will be continued for decision to Tuesday, October 21, at 9:30. The defendant will remain [102] out on bail. We will now adjourn for the day.

(Thereupon an adjournment was taken to Tuesday, October 21, 1952, at the hour of 9:30 o'clock a.m.) [102-A]

November 7, 1952, at 10:00 A.M.

The Clerk: U. S. vs. Schuman for sentence.

The Court: Anything you desire to present to the court, Mr. Karesh?

Mr. Karesh: We recommend, your Honor, if the defendant be willing to accept noncombatant service, we would recommend to the local board the same, and then recommend that the judgment be set aside and the case dismissed, for the reason that you cannot induct men while on probation. But if he refuses to accept noncombatant military service, the Government will recommend, of course, that probation be denied, since probation is foresworn one who disobeys the lawful orders of the probation.

The Court: Mr. Brill, do you know if the defendant is willing to apply for a classification of 1-AO, which is noncombatant service, such as the Medical Corps—something of that sort, do you know?

Mr. Brill: I have discussed it.

The Court: Have you any objections to his answering the question himself?

Mr. Brill: No.

The Court: Mr. Schuman, while the court is not obliged to do this, the court can listen with a very lenient ear here if you would be willing to accept noncombatant service.

The Defendant: Well, your Honor, I would like to thank [103] the court for allowing me, and Mr. Karesh, because it is very generous, but, my conscience just will not allow me to help the war effort in any way. I appreciate it. It is a wonderful thing for you to do this for me, but it is a matter of my

conscience, what I feel inside of me, and I cannot help the war effort in any way.

I thank you.

The Court: Mr. Brill, anything you desire to say.

Mr. Brill: No, I can add nothing to do that. I would, however, urge that probation be granted here. I haven't seen the probation report, but I have no doubt it indicates that this boy has a spotless record.

The Court: Oh, yes. But probation is granted when a man realizes that he has made an error and is now willing to comply. That is the purpose of probation. You can hardly grant probation when a man does not admit an error and is not willing to comply. The probation officer advises against probation.

It is a very difficult case. In 1948, the defendant Schuman registered for the Universal Military Training Act. At the end of 1949—. He was raised in the Jewish faith. At the end of 1949, according to the evidence presented here, he met a young lady of the Catholic faith. They both decided to leave the respective faiths, which they have a right to do, if they wish, to become interested in Jehovah's Witnesses. The [104] Korean war started in June, 1950, and in September, 1950, he became immersed and, according to his claim, he became an ordained minister of Jehovah's Witnesses.

He is 22 years old.

Now, of course, the court has only three things to determine, which it did determine. First of all, his

rights were protected. He had a personal appearance before the Selective Service Board. He had a personal appearance before the Board of Appeals. All the notices required by law were given. So that is the first one.

The second thing is whether there was any bias or prejudice on the part of the board, either one. I don't know even if we have to go that far, but we permitted that. There was no prejudice shown by it, by the Selective Service Board or by the Appeal Board.

And the third is whether there is any basis in fact for the finding of the board, and there isn't any question under the facts there is a basis in fact for the finding of the Selective Service Boards that he should be put in 1-A.

The defendant has been asked in open court whether he would be willing to accept noncombatant service, which is the Medical Corps or something of that sort, and he refuses to do that.

The Court has no alternative. The defendant is sentenced to a term of eighteen months and remanded to the custody of the [105] Attorney General of the United States.

Mr. Brill: If the Court please, may I make a further motion at this time. I would like to make a motion for bail. I make the representation to the Court that we will in the time and manner required by law file an appeal in this matter. I feel the appeal would be prosecuted in good faith by myself as counsel for him. We intend to urge substantial questions of law and we remind your Honor of the

questions which were presented at this trial, namely, the question of confrontation of witnesses which we strenuously urged here, and I might call your Honor's attention to two cases involving that question, which are going to be heard on November 14 in which the trial court denied bail and the circuit court granted bail in both of these two cases. There are other substantial questions of law, all of which were outlined in the motion made for judgment and acquittal in this matter, and we strenuously urge that bail be allowed because the circuit court, if they should find there was an error of law, this man will have served time erroneously.

The Court: How do you feel about it?

Mr. Karesh: Your Honor has stated its findings. There is no substantial question on appeal. The rule requires bail only if there is a substantial question.

The Court: Well, there may be. For example, there isn't any question in my mind, but there may be a question involved [106] as to whether or not the basis in fact should be argued. If bail is allowed, what bail should it be. What is the bail now?

Mr. Brill: One thousand dollars.

The Court: That ought to be ample to keep the defendant within the jurisdiction.

Mr. Karesh: May I make this observation?

The Court: I don't want to keep this jury waiting.

Mr. Karesh: I just want to make one statement. I feel that in a Selective Service case where there is no question of a substantial question on appeal that to permit liberty pending appeal after sentence is

contrary to the spirit and intent of the law. This is a young man of draft age who is offered the opportunity for noncombatant service, who will not accept noncombatant service, to be permitted bail is contrary to the rule and I think would not be in the interest of the Selective Service. And if there is a substantial question, let the Circuit Court of Appeals do it. But I would urge your Honor, and none of the district Judges, and I say this respectfully, have been granting bail. True the Circuit Court has overruled the District Court on occasion. But I don't think bail would be proper because there is no basis in fact. There is the question of the sufficiency of the evidence, and indeed there is no question there.

The Court: Well, suppose you draw up, Mr. Brill, a statement so that I can study it as to what constitutes grounds [107] for bail and we will continue the matter and allow the defendant out pending the determination of that.

Mr. Karesh: I would have no objection to that. You are granting a stay of execution say for——

The Court: Say a week from today, to give Mr. Brill time to draw this up.

(Thereupon the matter of determining admission of the defendant to bail continued to Thursday, November 13, 1952, at 9:30 a.m.)

Certificate of Reporter

We, official reporter(s) and official reporter(s) pro tem, certify that the foregoing transcript of 108 pages is a true and correct transcript of the matter

therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ H. A. FOSTER,

/s/ W. A. CANNON. [108]

October 21, 1952

The Clerk: United States versus David Don Schuman, for decision.

The Court: Gentlemen, in this matter there was one witness, his name is Mr. Bonzani.

Mr. Karesh: Yes.

The Court: I have been considering the fact that certain questions asked of him were sustained; some of them should have been sustained and some of them, I think, should not have been sustained.

Therefore, I feel an opportunity should be given to the defendant's attorney to examine him further, if the defendant's attorney wishes to do that.

Mr. Karesh: May I at this time, your Honor, voice as very strenuously as I can a protest against such a reversal of ruling by your Honor, and I say that your Honor, and I say it in all respect, calling back a board member and permitting his questioning is running squarely in the teeth of the decision of the Supreme Court of the United States. And I should like to call to your Honor's attention and quote the language of Justice Rutledge in the Falbo case——

The Court: 320 U. S. 549.

Mr. Karesh: I would like to read you precisely

what the judge said in his concurring opinion, if I may. [2*]

The Court: Go ahead.

Mr. Karesh: This is what Mr. Justice Rutledge said in the Falbo case:

“I concur in the result and in the opinion of the Court except in one respect. Petitioner claims the local board’s order of classification was invalid because that board refused to classify petitioner as a minister on the basis of an antipathy to the religious sect of which he is a member. And, if the question were open, the record discloses that some evidence tendered to sustain this charge was excluded in the trial court. But petitioner has made no such charge concerning the action of the Repeal Board which reviewed and affirmed the local board’s order. And there is nothing to show that the Appeal Board acted otherwise than according to law. If therefore the local board’s order was invalid originally for the reason claimed, as to which I express no opinion, whatever defect may have existed was cured by the Appeal Board’s action. Apart from some challenge upon constitutional grounds, I have no doubt that Congress could and did exclude judicial review of Selective Service orders like that in question. Accordingly I agree that the conviction must be sustained.” [3]

And once more I make the assertion, your Honor, it is immaterial what occurred before the local

*Page numbering appearing at top of page of original Reporter’s Transcript of Record.

board, no matter what their mental processes might have been, because the local board's action was sustained by the Appeal Board, and the United States Court of Appeals for the Ninth Circuit has held, it is the law of this Circuit and I believe it to be the law of the land, that once an appeal is taken, anything that occurs before the local board becomes immaterial and incompetent. That is why the Congress set up the Appeal Boards to take care of any error or any prejudice which might have occurred before the local board.

Now, I say, your Honor, it would be wrong to call back the Chairman or member of the local board. I say this also to your Honor that these members serve without compensation and I don't believe that they should be called away from their business to testify upon a matter that is wholly immaterial.

Now, the only question before this Court is whether or not there is any basis in fact for the 1-A classification, and that is to be determined from the file. And if there is a basis in fact for the classification, there is nothing for this Court to decide.

Now, is there a basis in fact for this classification? I make the argument, because counsel filed without the permission of the Court a memorandum. Let me say this, your Honor, [4] that the burden rests upon the registrant. This is not a case where the burden is upon the Government to prove beyond a reasonable doubt that he should have been classified in 1-A. The burden is upon the Government only to show that he refused to submit to induction under the regulations. The burden is upon

the registrant to show that he should have been classified in a class other than 1-A and for a very cogent reason, your Honor, because as the preamble of the Selective Service Act and the Universal Military Training and Service Act states, this is a system of selection by boards of neighbors, and when a man does not go into the Armed Forces of the United States somebody else has to take his place.

Therefore, the burden is upon him to show that when he does not go in someone else takes his place, that that was just and that was right.

The Court: Is it your contention if there were in fact, and of course I don't mean to intimate there is, if there were in fact bias, prejudice and no other basis in fact for the classification by the first Selective Board, would it not be material?

Mr. Karesh: Now, so far as the first board is concerned—let us go to the first board. There could be bias, there could be prejudice, there could be no basis in fact. That is for the first board. But if an appeal is taken and there is a basis in fact for the classification by the Board of Appeal, [5] that is all that is necessary, because Congress intended that the mental processes of these men, sitting upon the boards and serving without compensation, shall not be explored. And I say it emphatically, and it is the law and the law of this Circuit and the law as announced by Mr. Justice Rutledge, that no matter what occurred before the local board it is immaterial where there is a basis in fact before the Board **of Appeal** to warrant the classification accorded.

That is why they set up these Appeal Boards.

Where else has there been set up a fairer system of protection to a registrant than under the Selective Service Act? One, they have a right of appearance before the local board after classification and a reclassification; and they have their right of appeal, and then they have a right, in the case a Board of Appeal member dissents, can go to the President of the United States.

The Court: I don't want to cut you short——

Mr. Karesh: Yes.

The Court: Mr. Brill, perhaps it won't make much difference to call him back. You want him called back?

Mr. Brill: Well, we, of course, felt it was material at the time we were questioning him when he was on the stand. I am not prepared to argue this matter now, I didn't know the question was going to be raised.

The Court: I raised it myself. It has been bothering [6] me for the last week.

Mr. Brill: But there are numerous cases, the Niznik case, for example, I don't have the citation, but I am sure counsel is familiar with it. Also the case in which the Circuit Court held that the man had not been accorded a fair trial because he was not permitted to show the bias and prejudice of the panel, the board at the personal hearing. They sent it back for a new trial, for further testimony, and when the further testimony of the new trial did not divulge a record different than that made originally, the Circuit——

The Court: Well, I think I would rather hear

the testimony. Gentlemen, what time would you like to have the matter heard?

Mr. Karesh: Anytime that is convenient.

The Court: When is it convenient to you, Mr. Brill? Would Friday at 10:00 o'clock be all right? Just for that one purpose, of reopening it for that purpose.

Mr. Brill: Friday, I think, would be all right, your Honor.

The Court: All right with you, Mr. Karesh?

Mr. Karesh: As I understand it the only issue now that is troubling the Court, assuming it is,—

The Court: I won't say, got a lot of other troubles.

Mr. Karesh: I mean in this particular case, for that one particular point? [7]

The Court: For the purpose of allowing Mr. Bonzani to take the stand. I sustained objections there that I feel that I went too far and I want to give the defendant's attorney an opportunity to ask those questions. If you have objections, you can make them.

Mr. Karesh: Your Honor, before your Honor does that, I don't like Mr. Bonzani to be taken away from his work, and may I say this, and I know your Honor has a jury and I will not be long—

The Court: All right.

Mr. Karesh: If this board member—if your Honor finds that there was prejudice, then you consider that that is to be justification regardless of the decision of the Board of Appeal, your Honor is

suggesting to Selective Service that Mr. Bonzani be stricken from the rolls?

The Court: Not passing in advance, I merely want Mr. Bonzani brought back and those questions that counsel wishes to ask him, you make your objections in the regular order and they may be sustained. I want a full opportunity be given; I don't think a full opportunity was given to examine Mr. Bonzani. I feel every party is entitled to it. I will assume the responsibility myself for calling him back. I would like to have either one or both of you gentlemen arrange to have Mr. Bonzani here at 10:00 o'clock on Friday, and if there are any questions you wish to ask him you may do so, and [8] if you want to object——

Mr. Karesh: Will your Honor give me permission, before he is called to the stand, to reargue this matter, before he takes the stand?

The Court: Yes, at that time we will have more time to argue about his taking the stand.

Mr. Karesh: Argue about calling him back.

The Court: I understand what you mean. The thing is, when a question is asked, that is the time for full opportunity for objection. We will be arguing in the concrete rather than the abstract.

Mr. Karesh: All right, Judge, we will have him here.

The Court: This matter then—will you arrange, Mr. Karesh, for his coming?

Mr. Karesh: Yes, I will tell him.

The Court: Have Mr. Bonzani here, and this

matter will be continued to Friday, October 24, at 10:00 o'clock.

Mr. Brill: Thank you.

Mr. Karesh: May I say this, your Honor: The memorandum that is filed by counsel, I don't know whether your Honor wants me to reply to that religious training and belief—

The Court: Glad to have all the help I can get. If you wish to make a reply I assure you I will carefully read it.

Mr. Karesh: Thank you, Judge.

Mr. Brill: I think the record should be cleared up. [9] Counsel made the statement that I filed it without permission of the Court. I made a trip out here and specifically asked the clerk to ask the Court's permission to file it, and as I understand it the Court granted permission.

Mr. Karesh: I didn't know it.

The Court: The clerk informs me we granted permission.

Mr. Karesh: All right.

The Court: If you want to file a reply brief I will be glad to have it, glad to have all the help I can get. It bothers me very, very much to have a young man 22 years old decreed a felon. If it has to be done, it has to be done. That is the situation. But I want to give him every possible opportunity.

All right, next matter, please. [10]

Friday, October 24, 1952, 10:00 A.M.

The Clerk: U. S. versus Schuman, further hearing.

Mr. Karesh: Ready.

The Court: All right, proceed, gentlemen. You wanted to call back this witness?

Mr. Karesh: The gentlemen is here.

The Court: Any further questioning which is proper by the attorney for the defendant and by counsel.

You come forward, Mr. Bonzani.

The Clerk: You have already been sworn. Please take the stand.

MR. JOSEPH BONZANI

called as a witness by the defendant, previously sworn.

Direct Examination

By Mr. Brill:

Q. Mr. Bonzani, who called you to appear today, to come to court?

A. I received a telephone call from Selective Service that the judge wanted to see me.

Q. That the judge wanted to see you?

A. Yes.

Q. Mr. Karesh called you? A. No.

Q. Have you discussed your testimony to be given this morning [11] with Mr. Karesh?

A. No.

Q. Haven't discussed it at all? Have you talked to Mr. Karesh before taking the witness stand?

A. Just now.

(Testimony of Joseph Bonzani.)

Q. Did he make any suggestions to you as to what your testimony should be?

Mr. Karesh: Objected to, your Honor, as incompetent, irrelevant and immaterial. Furthermore, he is impeaching his own witness.

The Court: That is true. It is perfectly proper for counsel to talk to witnesses in order to find out what they know. Nothing wrong in that.

Mr. Brill: The question was whether or not Mr. Karesh made any suggestions as to what he should say.

Mr. Karesh: He is impeaching his own witness.

The Court: I will allow the question. What was the answer?

The Witness: What was the question again?

Q. (By Mr. Brill): Did Mr. Karesh suggest to you what your answers to the questions this morning should be?

A. Well, he just pointed out that—he said while I was on the stand the other day there were three witnesses, three board members present; the records only disclose there were two. [12]

Q. Does that change your recollection at all now?

A. No.

Q. However, you feel that the record would disclose the true situation, would it not?

A. That's right.

Q. And the record does indicate that just you and Mr. Dooley were present at that hearing?

A. That's right.

Q. You do have a recollection, however, I be-

(Testimony of Joseph Bonzani.)

lieve you said that the record was written, a transcript of the testimony was made, a shorthand reporter took notes at the hearing and subsequently a transcript of the testimony of that hearing was made, isn't that right?

A. Wasn't a shorthand reporter, it was Miss Eubank made the record, she took it in shorthand.

Q. At least notes were made in shorthand and later transcribed? A. That's right.

Q. I would like to read to you something that I think is Government's Exhibit No. 18, question by Mr. Dooley.

"Do you wish us to consider your classification on the conscientious objection or on the grounds of being a minister?"

Mr. Karesh: What page is that?

Mr. Brill: I'm sorry, page 8 of the——

Mr. Karesh: What lines? [13]

Mr. Brill: It isn't numbered. Down, two-thirds of the way down.

"Registrant: Both grounds, I am opposed to all forms of service.

"Mr. Dooley: Present your side of the case.

"Registrant: I would like to call your attention to the affidavits in my file (going through his file) if I can find them.

"Mr. Dooley: I have read everything in your file, the statement signed by Harry G. Whitcomb and the ones signed by various others. State your basis for your claim as conscientious objector.

"Registrant: I am conscientiously opposed by

(Testimony of Joseph Bonzani.)

the belief I have in the bible and Jehovah's Witnesses to serve in the Armed Forces.

"Mr. Dooley: Don't you feel you have an obligation to your country?

"Registrant: Do you personally believe in the bible?

"Mr. Dooley: There isn't any question of that.

"(Registrant here quoted the bible.)

"Registrant: I respect the Government of the United States, I want to do everything the Government wants except fight. [14]

"Mr. Dooley: If a man walked up to you and hit you, would you hit him back?

"Registrant: I don't know.

"Mr. Dooley: If the enemy invaded our shores?

"Registrant: I would not shoulder a weapon.

"Mr. Dooley: You know, during the war the enemy was very cruel to persons of your extraction, that could very well happen again, what would you do?

"Registrant: Jehovah's Witnesses were shot to death because they would not kill American soldiers.

"Mr. Dooley: What do you think should be done in the case of an emergency?

"Registrant: I don't believe killing is the right thing to do, I would render unto Caesar, and render to God what belongs to God.

"Mr. Dooley: Would you salute our flag?

"Registrant: I have objections.

(Testimony of Joseph Bonzani.)

“Mr. Dooley: Would you take off your hat?”

“Registrant: I would show proper respect.

“Mr. Dooley: Anything further to say?”

“Registrant: I hope you will have an accurate summary in my file, and if you desire any further information or wish to speak with me again I will be happy to appear.

“(Registrant was dismissed and interview terminated.) [15]

“Summary: Primary vocation is student. Continued in 1-A. Request denied for classification as ordained minister and conscientious objector.”

Q. (By Mr. Brill): Subsequent to that the Board, pursuant to this hearing, did deny the registrant his claim as a conscientious objector, isn't that correct? A. Prior to this hearing?

Q. No, subsequent to it.

A. Oh, yes, that is correct.

Q. Now, will you tell us what the basis of your vote was finding that the registrant was not a conscientious objector?

Mr. Karesh: To which we object as incompetent, irrelevant and immaterial. Furthermore, we say that the action of the Appeal Board superseded the action of the local board and the decisions are in this Circuit as to the latter proposition cannot be disputed, and I have the language from the decision. No matter what the basis of the decision was—let us do it in reverse. One, no matter what the basis of the decision was, it is immaterial, you can't explore his mind and go to his reason. Two,

(Testimony of Joseph Bonzani.)

the action of the Appeal Board superseded the action of the local board.

The Court: Objection overruled. Let him answer.

Mr. Brill: I think the Court has ordered you to answer the question.

The Witness: Well, the Board, in deciding his case, felt [16] that he was not a student minister, that he was not a regular ordained minister, and as such his file revealed he was going to school and on that basis felt not being an ordained minister and not a full-time student of a recognized theological seminary with a full course of instruction, he had no basis on his conscientious objector.

Q. In other words, as I understand, because you found that he was not, had not attended a regular divinity school and that you could not find him to be a minister, you, therefore, found there was no basis for his claim as a conscientious objector, is that correct?

The Court: Well——

Mr. Karesh: That wasn't his answer.

The Court: That is not the statement he made.

Mr. Brill: Well, I should like to have the statement read back again, if I may. I may have misunderstood it.

(Answer read by the reporter.)

Q. (By Mr. Brill): I would like to ask, repeat the question I asked.

The Court: First, it is cross-examination of your

(Testimony of Joseph Bonzani.)

own witness. He has answered your question and he has given the reason, and that's all. That's it. Nothing to explain any further. You asked the question, he has given you the reason.

Q. (By Mr. Brill): That was the basis upon which you cast your vote, is that correct? [17]

Mr. Karesh: For what action, counsel?

Mr. Brill: For the determination of the claim as a conscientious objector.

Mr. Karesh: Not as a minister?

The Court: Now, you see, he cast his vote as 1-A, that covers everything. You also considered whether he was a conscientious objector?

The Witness: When we considered his case we considered all the actions.

Mr. Brill: Well, if the Court please, there were two bases for his claim for exemption; one was that as a minister, a regular minister; the other as a conscientious objector.

The Court: The witness says he considered them both.

Mr. Brill: I have restricted my questioning to that portion of the transcript which indicates that the Board split up their inquiry, because where I started they asked him to state his case as a conscientious objector. That is on page 8 of the transcript.

Mr. Karesh: There was language before that he used, counsel, asking him to repeat it.

The Court: Well, the entire transcript is in evidence.

(Testimony of Joseph Bonzani.)

Mr. Brill: Yes, that's correct.

The Court: And if you want to read it to the Court you may. If you want this witness to read it to the Court, he will.

Mr. Brill: I think the Court—— [18]

The Court: I don't know what else we can do except hear the record. Now, you stated that based upon his observation, evidently of the registrant, he had the opportunity that the Court hasn't, he had the opportunity of examining the registrant, observing his demeanor on the stand, method of his answering questions and everything connected with that, and from the entire questioning, considering all the rules of observation of witnesses, considering the question of minister, considering the question of conscientious objector, he evidently came to the opinion that he should be in 1-A. Is that about it?

The Witness: That is correct.

The Court: Without asking the witness apparently that is the situation. Now, what else would you like to ask him?

Q. (By Mr. Brill): Can you tell us whether or not the regulations provide that a regular minister must be one who attended a recognized divinity school?

Mr. Karesh: Now, your Honor, we object to this as a very unfair line of questioning. It is not fair to place a witness on the stand to attempt to embarrass him to find out how much of Selective Service regulations he knows or how much he does

(Testimony of Joseph Bonzani.)

not know. The Governor of the State of California, the President, felt that he had enough knowledge, he was appointed, serves without compensation. He is presumed to know these regulations and based upon his knowledge of the regulations, based upon the evidence he put him in 1-A, and [19] I don't think this line of questioning should be pursued, and he is your own witness.

The Court: If he remembers what the regulations are now, changed from time to time. I presume he was acquainted with the regulations at the time, is that what you want to know?

Mr. Brill: Find out what his knowledge of the regulations were at the time he considered this classification.

Mr. Karesh: To which we register another objection, please, that it is immaterial what happened there. The Appeal Board was the one that was the ultimate authority, that is why we have Appeal Boards, to take care of any errors involved. In this case, of course, there wasn't.

The Court: Well, perhaps the witness wants to refresh his memory by looking at the regulations. Now, I have some general knowledge of the regulations, but if you were to ask me at this moment just exactly how the regulations read, I would have to study it, look it up myself. He is supposed to remember now what the regulations were at that time?

Mr. Brill: If the Court please——

The Court: I can't see the materiality.

(Testimony of Joseph Bonzani.)

Mr. Brill: The materiality of this, when a registrant appears before a Board such as this—I realize they serve without compensation—but the fact is that they are passing upon the lives of individuals who appear before them. When the individual appears before them he has a right, a [20] constitutional right to have this determination made in accordance with the regulations.

Now, if the hearing officer is under a misapprehension as to the requirements or qualifications for any particular claim of exemption, then he has not had the fair hearing he is entitled to, that is, the registrant has not had a fair hearing. Let us assume, for the sake of argument, that, and I think as the record will bear me out, that the determination of conscientious objectors was made, particularly in this case, on the basis of the fact that this registrant did not attend a recognized divinity school, and I think when you honestly analyze the answer given to that question there can be no other conclusion but that that was the basis upon which they refused to give him a conscientious objector classification.

Mr. Karesh: May I—

Mr. Brill: May I finish?

Mr. Karesh: Your Honor, I am going to object to this line of questioning again, going to object to this line of harrassment. The man did not testify—in effect, you confused him, your own witness—he didn't say on the basis of fact that he was a student—

(Testimony of Joseph Bonzani.)

(Both counsel talking at once.)

Mr. Brill: Call upon the Court to make an orderly trial of this matter.

Mr. Karesh: Then you be orderly with this witness. [21]

The Court: As we understand now, Mr. Brill is arguing the matter, so go ahead with your argument, and he has a right to argue the matter as fully as he wishes.

Mr. Brill: I was pointing out that the registrant has a right to be heard by persons who properly determine the evidence before them. Now, it is true there has been an appeal. I will point out to your Honor what happened by the Appeal Board, according to the record here, but in the first place, the regulations give him a right to a fair hearing. Now, a fair hearing means a hearing before a man who understands the regulations so that he may pass upon the evidence before him and classify the registrants in accordance with the regulations as they pertain.

Now, the regulations with reference to ministers are broken down into several classes. There are ordained ministers, there are regular ministers. Regular ministers are not required to attend a recognized divinity school. Now, let's say that this witness, or this Board Member, understands that that is the determining factor. That would not be a fair hearing if the registrant claims to be a regular minister, the same as if he claimed to be a conscien-

(Testimony of Joseph Bonzani.)

tious objector, and the refusal to determine or find a determination that he was, based upon the question of where he went to school or what color tie he wore.

Now, we have a right to determine whether or not this man, who was a Board Member, knew those regulations and applied [22] them properly, and I think the cases bear us out. We submit that is the purpose for these questions.

Mr. Karesh: I once more assert, your Honor, the cases do not bear him out. There are myriads of cases that you can't explore the mental processes. The Supreme Court said if there is any basis in fact for the classification, that's it. And there is ample basis in fact here both by the local board and the Appeal Board to not give him a 4-D, because he was not engaged full time. That is the best as distinguished from the last war, and the decisions upon which you rely; and second, he was not a conscientious objector by reason of religious training, as well as belief. Let us go into his training that he had.

The Court: Well, suppose you ask your questions and I will try to pass on them. Would you like to look at the regulations as they were at the time, want to do that?

The Witness: I would like—may I have the question?

The Court: Have you got a copy of the regulations as they were at the time he passed on them? Got a copy of the regulations?

(Testimony of Joseph Bonzani.)

Mr. Karesh: Here are the regulations.

The Court: The witness says he would like to see what the regulations were at that time.

Mr. Karesh: That is just a minister.

The Court: That is considering a minister. Where are the [23] regulations concerning conscientious objection. Ministers is on page 5, minister of religion. Where are the provisions for conscientious objectors?

Mr. Karesh: I have it in this brief I just filed. Here are the conscientious objector provisions, both of the Act and the regulations that follow.

The Court: "Class IV-D: Minister of Religion or divinity student. (a) In class IV-D shall be placed any registrant:

"(1) Who is a regular minister of religion;

"(2) Who is a duly ordained minister of religion;

"(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

"(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

"When used in this title——"

(Testimony of Joseph Bonzani.)

Section 16 of Title I of the Selective Service Act [24] of 1948 contains in part the following provisions:

“Sec. 16. When used in this title * * * the term ‘duly ordained minister of religion’ means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rights and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

“The term ‘regular minister of religion’ means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect or organization as a regular minister.

“The term ‘regular or duly ordained minister of [25] religion’ does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in

(Testimony of Joseph Bonzani.)

accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.”

That is for a minister. Now, for a conscientious objector, title 50 United States Code, Section 456-J provides as follows:

“Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, [26] sociological, or philosophical views or merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board, shall, if he is inducted into the Armed Forces under this title, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if

(Testimony of Joseph Bonzani.)

such claim is not sustained by the local board, be entitled to an appeal to the appropriate Appeal Board. Upon the filing of such appeal, the Appeal Board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing if the objections are found to be sustained, recommend to the Appeal Board that (Fig. 1) if the objector is inducted into [27] the Armed Forces under this title, he shall be assigned to non-combatant service as defined by the President, or (Fig. 2) if the objector is found to be conscientiously opposed to participation in such non-combatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the Appeal Board that such objections be not sustained. The Appeal Board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

(Testimony of Joseph Bonzani.)

Part 1622.20 of Selective Service Regulations read as follows:

“Class IV-E”—this is the old 4-E, now 1-O, I presume it is the same.

Mr. Karesh: That was applicable at the time.

The Court: At the time.

“Conscientious objector opposed to both combatant and non-combatant and service. [28]

“(a) In Class IV-E shall be placed any registrant who, by reason of religious training and belief, is found to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and non-combatant training and service in the Armed Forces.”

Now, in considering whether he was a minister or as a conscientious objector, they are two different things, you understand that?

The Witness: Yes.

The Court: Now, what was the question?

Mr. Brill: Well, as I recall, I asked the witness to tell us what his understanding of the regulation was at that time as to the facts to be found in order to find that the registrant was a minister or—yes, a minister.

Mr. Karesh: We renew our objection, your Honor.

The Court: Well, answer the question.

The Witness: Well, the Board, in considering his case, felt that he was not a full time minister

(Testimony of Joseph Bonzani.)

as a vocation. He was probably, as an avocation, acting as a minister.

Q. (By Mr. Brill): You say he was acting as a minister as an avocation?

A. Well, part time, or maybe some duties, some lectures, something like that, but not a full-time minister as a [29] vocation.

Q. Now, because of the fact that he was not spending his full time as a minister I assume that is what you are telling us? A. That's right.

Q. Now, what was the basis upon which they found that he was not a conscientious objector?

Mr. Karesh: Your Honor, we renew our objection. The files speak for itself. We can't go into the mental processes of this person here, said he had no prejudice against the registrant——

Mr. Brill: Just a moment, he hasn't said any such thing. That question wasn't asked.

Mr. Karesh: I thought it was asked.

The Court: According to the testimony, it was part of his testimony, that is all. Overruled. Let him answer. What was the question?

Q. (By Mr. Brill): The basis upon which you found that he was not a conscientious objector?

A. Well, feeling that he was not a full-time minister——

The Court: You can be a conscientious objector without being a minister.

The Witness: Yes.

Mr. Brill: Your Honor, I am going to object to the Court's advising the witness. I think the wit-

(Testimony of Joseph Bonzani.)

ness should be [30] allowed to answer the question.

The Court: All right. I think you are correct. Go ahead and answer the question.

The Witness: The Board felt that not being a full-time, acting full minister, full vocation, and considering that he is just giving lectures and his file indicating that he was a student up until a certain period, that there was no basis for his conscientious objection.

Mr. Brill: I think I will ask no further questions.

The Court: Any questions, Mr. Karesh?

Mr. Karesh: Yes.

Cross-Examination

By Mr. Karesh:

Q. In determining whether or not this man was entitled to a classification as a conscientious objector, you had the whole file before you, is that not correct? A. That's correct.

Q. And you went into his religious training and belief, is that correct? A. That's right.

Q. And you determined his religious background, is that correct? A. That's right.

Q. Your testimony was not, your determination was not based upon the fact that he was merely a student minister?

Mr. Brill: Just a moment—— [31]

Mr. Karesh: He isn't my witness, he is yours.

Mr. Brill: I would like to make my objection.

(Testimony of Joseph Bonzani.)

Mr. Karesh, I don't like to be instructed by you. I have been in court plenty of times.

Mr. Karesh: So I am told.

Mr. Brill: Like to make my objection on the ground that this is leading and suggestive.

The Court: It certainly is, and cross-examination, it is intended to be leading and suggestive under the law. Nothing wrong with a leading and suggestive question under cross-examination.

Mr. Brill: Make our objection on that ground.

The Court: Overruled.

Q. (By Mr. Karesh): Isn't it a fact, Mr. Bonzani, that in determining whether or not he was entitled to a claim as a conscientious objector, not as a minister now, but as a conscientious objector, you took into consideration all of his religious training, is that right? A. That's right.

Q. And his religious, so-called religious background, is that correct? A. That is right.

Q. Your decision wasn't based upon the fact that he was only a student minister, distinguished from an ordained minister, in determining he was a conscientious objector? [32]

Mr. Brill: Object to this line, entire line of examination on the ground it is leading and suggestive. The witness has been shown to be an employee of the Government, he is an adverse witness, and we don't feel that the questioning of this witness should be in a narrative form calling for a yes or no answer by the witness. Object to that.

Mr. Karesh: I don't know of any provision

(Testimony of Joseph Bonzani.)

that he is called as an adverse witness in a criminal proceeding.

The Court: I don't know how you can call him an adverse witness when the Court has allowed the asking of leading questions, but certainly under cross-examination you can't stop asking leading questions. If you want to object on the ground that the question is complicated, that it is indefinite, something of that kind, you may, but merely cross-examining on the points you brought out merely because the answers don't suit you is no ground for objecting.

Mr. Brill: It isn't that the answers don't suit me, it is upon the form of the question, and upon the further ground we are making our objection to this entire line of examination on the ground it calls for an opinion and conclusion of the witness.

The Court: Well, under direct examination of the witness you asked him, you wanted to know what his opinion was and what conclusion he based it on. Overrule the objection. You may answer the question. Ask the question again. [33]

Q. (By Mr. Karesh): In considering whether or not he was entitled to a conscientious objector classification you didn't base your decision only on the fact that he was a student minister of Jehovah's Witnesses, as distinguished from a full-time minister, did you? A. No, sir.

Q. And the whole file was before you, is that right? A. Correct.

(Testimony of Joseph Bonzani.)

Q. You have any prejudice against him because he is a Jehovah's Witness?

A. None whatsoever.

Q. And prejudice against him because at one time he was Jewish and turned Jehovah's Witness?

A. No.

Mr. Karesh: That is all.

The Court: Any further questions of this witness?

Mr. Brill: No further questions.

Mr. Karesh: No questions.

The Court: You have had full opportunity to examine the witness?

Mr. Brill: Pardon?

The Court: Any questions you want? I want you to have a full opportunity to examine him so there won't be any question about that.

Mr. Brill: We appreciate that, your Honor. I would like [34] to say this for the record: That the right of examination of the witness such as this depends to a great extent upon the element of surprise. We feel that the registrant's and the defendant's case has been prejudiced in the manner in which—the witness was called originally by us under subpoena. Questions were put to the witness. He was refused, or we were refused the right to proceed with questioning. It then was put over until today. I realize there was no malice aforethought of any kind, but the right of examination depends upon, as I see it, the element of surprise, and we feel that it has been prejudicial to the

(Testimony of Joseph Bonzani.)

defendant in this case to allow this witness to go from court and be called back by the plaintiff, the prosecution in this case.

On the question of the calling back of the witness, as I understood the Court's direction, it was made to Mr. Karesh, the United States Attorney's office, to have him back here. Now, I suppose that technically he originally was our witness and this was a matter of convenience, but I think I have stated our position for the record.

The Court: Just a moment. The Court will answer that. You have made many mistatements in your statement, Mr. Brill. In the first place, the element of surprise does not exist here. From the testimony before the Court no one has talked to this witness since the last time with the exception for a moment that Mr. Karesh spoke to him this morning. He told you [35] what the conversation was.

In the second place, Mr. Karesh did not suggest that this witness be called, nor did I discuss the matter at any time with Mr. Karesh in your absence. The only discussion was had with Mr. Karesh was in open court in this matter, and you were present. And Mr. Karesh did not ask that the witness be brought back, the Court did, merely because the Court believed, wanted to give you full examination of this witness, full opportunity to examine.

The Court still is in great doubt as to whether or not it is proper to ask this witness the questions

(Testimony of Joseph Bonzani.)

which you asked the witness this morning. But the Court determined, permitted you to ask, gave you broad latitude.

Now, I cannot see in any way how the defendant is prejudiced at all by the fact that the witness has been called back for further questioning and the answers given us by the witness today are substantially the same as given by the witness the other day under cross-examination.

It is very clear that he examined the whole record, and unless this witness has shown some reason not to have paid attention to the record—he saw the witness, he saw the registrant, he talked to him personally, he arrived at certain conclusions as to whether or not he was a conscientious objector under the rules. He hasn't been impeached in any way. I wanted to give you every opportunity to examine him, to show [36] some bias or prejudice of any kind. None has been shown.

Now, anything further you wish to ask of this witness?

Mr. Brill: Nothing at this time, your Honor.

The Court: Anything further, Mr. Karesh?

Mr. Karesh: Nothing.

The Court: Mr. Bonzani, you are now excused and you may go home now—you may go to work.

(Witness excused.)

The Court: Gentlemen, any other witnesses either counsel desires to present? Mr. Karesh?

Mr. Karesh: No.

The Court: Mr. Brill? Is there any argument either counsel wishes to present now in addition to the argument given the other day? Not the same argument, but additional arguments of any kind?

Mr. Brill: I feel that I would like to point out to your Honor the record here, I think it is Government's Exhibit No. 24, 25—we have the exhibits here—no, it is not 25. In any event, it is a document dated November 1, 1951, and I'm sure it is in the record, and it would be—it is called individual appeal record of the local board 38. Do you know what the number is? A young man from my office, who is here with me, kept the notes in his own brief case and I neglected to take them with me.

The Court: What was the date of the [37] paper?

Mr. Brill: November 1, 1951, and called Individual Appeal Record.

The Court: What is the number?

Mr. Brill: I don't know the exhibit.

Mr. Karesh: Your Honor may have my copy.

Mr. Brill: This document clearly shows that the appeal taken by him and considered by the Appeal Board, according to the official minutes of the action of the Appeal Board, indicates that the registrant requested 4-D classification, as minister of the Jehovah's Witnesses, and no action, official action of any kind was taken by the Appeal Board itself on the question of conscientious objection. Now, it is true that there are other documents indicating that there was a hearing and that there was a recommendation by the Department of Justice.

But there was no official action taken by the Appeal Board itself other than as indicated by the minutes of action of the Appeal Board, which indicates that by a vote of three to nothing the classification was made 1-A upon the consideration of an appeal in which the registrant requests 4-D classification as a minister of Jehovah's Witnesses, but it is silent as to the consideration of the question of conscientious objector. I felt the Court ought to know that.

The Court: What about that?

Mr. Karesh: Your Honor, I can explain that. That's the clerk, in sending the record to the Board of Appeal, simply [38] said registrant requests a 4-D classification, minister, Jehovah's Witnesses. However, you will notice the Appeal Board did not pay any attention to that. If they had they never would have sent the file to the hearing officer for the reviewing of his claim as a conscientious objector. And Your Honor will note the inquiry on the back of the questionnaire.

It reads:

Appeal Board Panel No. 3 received this file and determined that the registrant should not be classified in either 1-A or C-O I may say at the time he had his hearings, the change from the 4-E to the 1-A, you will notice the Appeal Board Panel 3 reviewed this file and determined that the registrant should not be classified 1-AO, but 1-A, by a vote of three to nothing under the circumstances set forth in the sub-paragraphs of Section 2625.

But of course, they sent it from——

Mr. Brill: That is just a memorandum.

Mr. Karesh: The decision.

Mr. Brill: That is a memorandum made by the clerk of the local board as to what the steps were, the chronological steps.

Mr. Karesh: Your Honor, that is not correct.

Mr. Brill: It is not official action by the Appeal Board. [39]

Mr. Karesh: That is the decision of C. E. Petty, Chairman of the Board of Appeal.

The Court: That is a determination of the Appeal Board, isn't it?

Mr. Karesh: Certainly.

The Court: Goes to the Department of Justice, a hearing is had, and reported back to the Department of Justice and goes back to the Appeal Board and the Appeal Board—

Mr. Karesh: Renders another decision.

The Court: Renders a decision, isn't that correct?

Mr. Brill: That is correct.

The Court: Their decision was that—

Mr. Karesh: 1-A.

The Court: It went farther than that. He said the Appeal Board reviewed the file, determined the registrant should not be classified 1-AO or 1-O.

Mr. Brill: And completely omits the question of minister.

The Court: Signed by—no—Oh, I see.

Mr. Karesh: Then, your Honor, I might as well explain those regulations, if the appeal involves a question of conscientious objection they make first

a determination as to the conscientious objector, and if they aren't going to give a CO to this man they send it to the hearing officer and the hearing officer then comes back and then they make their final determination. [40]

The Court: Mr. Brill points out this statement doesn't say—this time the objection is not they left out conscientious objector, this time they left out the minister.

Mr. Brill: Took an appeal on that ground, that is what the minutes indicate, that he took an appeal on the ground he was a minister, and instead of determining the question of minister they determined the question of conscientious objector and the minister is up in the air.

Mr. Karesh: Now, your Honor, it refers to a particular paragraph in the regulations. I don't want counsel to trick the Court, I don't think you can.

Mr. Brill: Mr. Karesh, I think that is slanderous.

Mr. Karesh: Well, I am not so sure. You know the regulations, counsel, you have had experience in draft trials.

Mr. Brill: I don't like you to use that language.

The Court: Never mind.

Mr. Karesh: I will repeat it.

The Court: In all fairness to Mr. Brill, Mr. Brill is making, it is his duty to present all these things to the Court and the Court will consider it.

Mr. Karesh: I may say, your Honor, counsel—

The Court: Confine yourself to the case.

Mr. Karesh: Counsel is very familiar with the Selective Service regulations and counsel knows if the question involves the claim of conscientious objection they first make the [41] determination as to the conscientious objection. If that determination is adverse to the registrant, it is sent on to the hearing officer and it comes back and on the basis of the entire record they make their final determination whether 1-A, 1-O, or 1-AO, and consider everything as a hearing de novo.

Mr. Brill: Then you show the Court where the action determines the question of his appeal from their refusal to give him a classification as a minister.

Mr. Karesh: There is no requirement that the Board say that he is not entitled to 4-D, 3-A, 4-E, 1-AO, 1-B, 1-C, 1-D; the 1-A is a denial of everything.

Mr. Brill: We are not going to enter into any banter with you, Mr. Karesh.

Mr. Karesh: I don't consider it banter.

The Court: Well, anything else anybody else wants to present?

Mr. Karesh: I just want to say one thing, your Honor: These people who talk about due process have had due process, and I ask your Honor to remember, as I know your Honor will, that this is a Selective Service system and that when somebody doesn't go somebody else took their place.

The Court: Anything else, gentlemen?

Mr. Brill: Submit the matter.

The Court: Well, the Court practically sits in

this case almost like the Court of Appeal over the District Court. [42] Findings of fact, unless they are arbitrary or wilful or biased or prejudiced, must be accepted by this Court.

There has been no showing at all of any bias or prejudice or motive on the part of the members of the Draft Board, no showing has been made there is anything the matter with them at all.

Now, as to whether or not the rules have been complied with, as to whether he had a hearing required by law—there is no showing that he didn't have all the hearings required by law and all the notices required by law, whether there is no basis at all for the classification.

The question before the Court is not whether the preponderance of the evidence would be in favor of a conscientious objector; the Court is not permitted under the laws to indulge in that. All this Court has to decide is as to whether or not there is any basis in fact whatsoever, and from all of the evidence presented there is no conclusion that the Court can come to except there is a basis in fact.

It might very well be, if this Court were sitting on a Board—as a matter of fact, I did sit on a Board many years ago. Many of these cases I found for exemption as a minority member, but I am not permitted to do that now in this case, and the law has to be followed.

It is therefore the duty of this Court and the Court does find the defendant guilty. [43]

Now, would you like to have this matter referred

to the probation officer for a pre-sentence investigation and report?

Mr. Brill: Yes, your Honor, I would.

The Court: All right. Now, what date shall we set this down for?

Mr. Karesh: If your Honor would set it at 9:30, because there is usually a trial.

The Court: Two weeks from today would be as good as any other day, gives the probation officer time. The defendant will be continued on bail.

Mr. Karesh: No objection, your Honor.

Mr. Brill: That date is——

The Court: Friday, November 7.

Mr. Karesh: 9:30, your Honor?

The Court: This matter will be continued until Friday, November 7, at 9:30 a.m., for the sentencing of the defendant. He is continued on bail. Probation officer will make a pre-sentence report at that time.

Anything further before the Court?

The Clerk: Nothing further at this time, your Honor.

The Court: Now at recess until 2:00 o'clock.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 44 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ RUSSELL D. NORTON. [44]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case, and that the same constitute the record on appeal herein as designated by the attorney for the appellant:

Indictment.

Minutes of September 10, 1952.

Minutes of September 24, 1952.

Waiver of jury trial.

Minutes of October 17, 1952.

Minutes of October 24, 1952.

Minutes of November 7, 1952.

Judgment and commitment.

Notice of appeal.

Order for release on bail pending appeal.

Order extending time for filing and docketing record on appeal.

Designation of record on appeal.

Reporter's transcript for October 17, 1952, and November 7, 1952.

U. S. Exhibits 1 to 32, inclusive.

In Witness Whereof I have hereunto set my

In the United States Court of Appeals
for the Ninth Circuit

No. 13692

DAVID DON SCHUMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS RELIED ON

Upon the appeal the appellant will rely upon the following points:

I.

That the evidence is insufficient to sustain a conviction for a violation of the Selective Service Act of 1948 as amended, and that the trial judge committed error in not granting the motion for judgment of acquittal made at the close of all the evidence.

II.

The undisputed evidence shows that the 1-A classification given appellant is arbitrary, capricious and without basis in fact, and that therefore the trial judge committed error in rendering a judgment against appellant and failing to acquit him.

III.

The trial judge committed error in failing to hold that the local draft board denied appellant his rights secured by the Act and Regulations, by fail-

ing to follow the definition and standard set up by the Selective Service Act, Section 16, Title I, as amended, for a determination of who is a minister of religion.

IV.

The trial judge committed error in failing to hold that the local draft board denied appellant his rights secured by the Act and Regulations, by failing to follow the definition and standard set up by the Selective Service Act for determination of who is a conscientious objector.

V.

The trial judge committed reversible error in failing to hold that the draft board did not have any basis in fact for the denial of the claim made by appellant for classification as a conscientious objector opposed to both combatant and noncombatant service.

VI.

The trial judge committed reversible error in failing to hold that the draft board denied appellant due process of law, in that the Board did not have any basis in fact for the denial of the claim made by appellant for classification as a conscientious objector.

VII.

The trial judge committed reversible error in failing to hold that the appeal board denied the appellant due process of law by acting upon a recommendation of the Hearing Officer appointed by the Department of Justice, which recommenda-

tion was in excess of the jurisdiction of such Hearing Officer as defined by the Selective Service Act.

VIII.

The trial court committed reversible error in failing to hold that the Act and Regulations, as construed and applied in this case, deprived the appellant of his constitutional rights guaranteed to him by the Fifth and Sixth Amendments, in that he was convicted without the opportunity of being confronted with witnesses that testified against him through the secret F.B.I. report used by the Department of Justice Hearing Officer in his determination.

It is desired that the entire record of testimony, motions and rulings of the Court be printed in this matter.

Wherefore, appellant prays that the clerk file the above statement of points and designation of record as required by the Rules.

Respectfully submitted,

/s/ J. H. BRILL,

Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 9, 1953.

